88-282

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM ALTER, UNITY VENTURES, and
LASALLE NATIONAL BANK,
Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY,
GEORGE BELL, VILLAGE OF GRAYSLAKE,
and COUNTY OF LAKE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Do Article III and this Court's holding in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985)—which required a formal final decision by state officials and pursuit of state remedial procedures before just compensation for a "taking" could be sought in federal court—impose the same "ripeness" requirement on Civil Rights Act suits under 42 U.S.C. § 1983 that do not claim any "taking," but rather seek damages from past denials of equal protection of the laws and due process of law?

2. Should the *Williamson* "ripeness" requirement be further extended, in spite of this Court's decision in *Patrick* v. *Burget*, 108 S.Ct. 1658 (1988), to require a formal official ruling before suits for damages from conspiracies to restrain trade may be brought against municipalities or officials under the Sherman Act, 15 U.S.C. § 1?

3. Does *Williamson* require exhaustion of reconsideration procedures when no prescribed procedures exist?

Pursuant to Rule 28.1, petitioners state that LaSalle National Bank is a federally chartered banking corporation acting here solely as trustee of Illinois Land Trust No. 103331, of which petitioner Alter and his children as partners are sole beneficiaries. LaSalle National Bank has no other interest in the case.

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on March 11, 1988.

OPINIONS BELOW

The opinion of the United States Magistrate recommending denial of respondents' motion to dismiss for lack of ripeness is unreported, and is at Appendix B, A. 18a.[1] The order of the United States District Court for the Northern District of Illinois adopting the Magis-

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[1] Citations to "A." are to the Appendix accompanying this petition. Citations to "T." are to the trial transcript and to "Ex." to trial exhibits; to "Br. Ct. App." to respondents' brief in the Court of Appeals; and to "Def. Mem." to Defendants' Memorandum in Support of Their Rule 50(b) and 59(a) Motions.

trate's opinion and denying the same motion also is unreported, and is at Appendix C, A. 40a. The order of the same court denying reconsideration of that order is at Appendix D, A. 41a. The opinion of the District Court entering judgment notwithstanding the jury's verdict is reported at 631 F. Supp. 181 and is at Appendix E, A. 42a; its opinion and order dismissing the procedural due process claim is unreported and is at Appendix F, A. 92a. The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 841 F.2d 770 and is at Appendix A, A. 1a. The judgment of the Court of Appeals is at Appendix G, A. 94a. The order of the Court of Appeals denying petitioner's petition for rehearing is at Appendix H, A. 96a.

JURISDICTION

The judgment of the United States District Court for the Northern District of Illinois was entered March 19, 1986. A timely notice of appeal was filed on April 15, 1986. The judgment of the United States Court of Appeals for the Seventh Circuit was entered March 11, 1988, and a timely petition for rehearing was denied May 5, 1988. On July 28, 1988, Justice Stevens entered an order extending the time for filing of this petition to and including August 15, 1988. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983, provides in relevant part:

> "Civil action for deprivation of rights
>
> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof

> to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

Section 1 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, provides in relevant part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

STATEMENT

Petitioner William Alter,[2] a successful developer of low- and moderate-cost housing and light industrial projects in Cook County (Chicago), Illinois, brought this action under the Civil Rights Act, 42 U.S.C. § 1983, and section 1 of the Sherman Act, 15 U.S.C. § 1, against three municipal and county officials,[3] the incorporated Village of Grayslake, and Lake County, Illinois, a prosperous suburban area lying immediately to the north of Chicago along the shore of Lake Michigan. His complaint alleged that respondents had conspired and acted in several ways unlawfully to block his development of land in Lake County for light industry and moderate-cost housing, and in so doing damaged him by denials of equal protection, procedural and substantive due process, and by violation of the Sherman Act. A jury found in his favor, awarding trebled damages of $28,500,000. However, the trial court set aside the award and entered judgment notwithstanding the verdict.

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[2] The other two petitioners are Alter's partnership with his children, and a bank which is nominal trustee of an Illinois land trust for the benefit of the partnership. All are collectively referred to herein as "petitioner."

[3] At the pertinent times, respondent Schroeder was the Mayor of Grayslake and President of its Board of Trustees, and respondents Geary and Bell were members of the Lake County Board and successively Chairmen of its Public Service Committee.

On appeal, the Seventh Circuit did not review that ruling, but instead affirmed on a ground that had been rejected by the District Court prior to trial and in findings after: the Court of Appeals held that petitioner's equal protection, due process and antitrust claims were never "ripe," because it said he had not received the kind of "formal" and "final" governmental decision, A. 10a, and had not exhausted reconsideration procedures, as would be required in a suit for just compensation on a "taking" claim. The Court of Appeals ruled that although he had been officially "rebuffed" and told orally and in writing that sewer access essential for development of his property was denied—and even though no prescribed procedure for a private developer to seek a sewer connection or review its denial existed—his civil rights and antitrust claims should have been dismissed as constitutionally "unripe" by the District Court.

A. The Facts at Trial.

The complaint alleged that respondents in various ways had conspired to block petitioner from access to any facility to treat sewage, in order to keep him from exercising a federally protected right to put up moderate-cost housing on a 585-acre open tract on which he acquired an option in 1972 and title in 1976. Respondents did so, according to the complaint, "to control the market for new residential, commercial, and light industrial development in their own parochial interests and unreasonably to restrain competition to the specific damage of" petitioner, who was an outsider seeking to serve a different socioeconomic market. Respondents later told the jury:

> "Why hasn't Mr. Alter been able to develop his property the way he wanted to? The evidence will be that he had never done business in Lake County before. He was familiar and comfortable with Cook County . . . ." Tr. 67.

The Village of Grayslake, lying just north of the tract purchased by petitioner, was a Lake County municipality of middle- to high-income families ranking among the most affluent in the Chicago metropolitan area. Its respondent mayor admittedly stated that he thought the County "could not afford" large numbers of "housing units, all being low or middle income bracket," which "would lend itself to nothing more than development of a shanty town." T. 608-09. By contrast, the nearby Village of Round Lake Park, which agreed to and did annex petitioner's land, was a blue-collar community with high unemployment, minimal commercial and industrial opportunities, and a short supply of affordable housing. Round Lake Park wanted "moderate, low-income type housing . . . in the blue collar area . . . smaller homes that would be within the reach of the younger people in the area." T. 441-42. Respondents, on the other hand, were concerned about what they called "one of Grayslake's vexing problems—Round Lake Park's irresponsible and indiscriminate zoning policies." Br. Ct. App. 43.

Petitioner undertook expenditures in excess of four million dollars to prepare his tract, called "Unity Development," for light industrial, commercial and moderate-cost housing. He obtained from Round Lake Park all the necessary zoning.

To complete development of the property, it was essential to provide for sewage disposal. Petitioner contacted the County Public Works Department, which administered sewer connections, and was told that his tract lay in the service area eligible to connect to a major new partially-federally-funded sewer line called the Northeast Central Interceptor, that collected from a large area of the County, including petitioner's property, to a central treatment plant. A. 44a. The County officials also informed him that the application to them for such a sewer connection should come from his municipality—the Village of Round Lake Park—rather than from the private developer himself.

In 1978, Round Lake Park on behalf of petitioner submitted to the County Public Works Department a formal request, with supporting engineering drawings, to connect petitioner's proposed development to the Northeast Central Interceptor. "Martin Galantha, Director of the Lake County Public Works Department, approved the plans . . . ." A. 5a, 46a. Under normal practice, no further County approval was required. But then, without petitioner's or Round Lake Park's knowledge, Galantha "sent them on to Mayor Edwin M. Schroeder for Grayslake's approval according to the sphere of influence agreement." *Ibid.* Without explaining why, Galantha told petitioner he should make an appointment to see respondent Schroeder, the Mayor of Grayslake. T. 754.

The meeting was brief. Respondent Schroeder, in a "heated discussion," T. 1516, informed petitioner and the Mayor of Round Lake Park for the first time that Grayslake had a previously undisclosed "sphere of influence" agreement, by which the County had granted Grayslake an extraterritorial veto power over connections to the Interceptor. Schroeder further explained that four months before petitioner completed annexation negotiations with Round Lake Park, Grayslake had persuaded the County to amend the agreement's coverage to (1) add petitioner's land, and (2) grant Grayslake veto power even over connections that were inside other municipalities. A. 19a-20a, 45a. The veto power was absolute and not subject to any prescribed standards. T. 122. No previous agreement had granted one municipality jurisdiction to block development inside the boundaries of another. The purpose, respondents admitted, was to empower Grayslake to use sewer service as a way to control development outside its borders. A. 76a; T. 206.[4]

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[4] Later all the Grayslake Trustees signed a letter explaining that "Control of the area immediately outside its boundaries is a matter of great concern to the residents of Grayslake. Without some semblance of control Grayslake could be completely surrounded by

Respondent Schroeder announced to petitioner that Grayslake had decided to exercise its authority under the agreement, and declined to consent to the sewer connection for petitioner's property. A. 46a. The mayor stated that he "acted with the authority of the village" and with the Board's "approval and knowledge" was announcing a decision by the Grayslake Board of Trustees, Grayslake's governing body. T. 273, 1481. The mayor said that not only would permission not be granted "at that time," but that "there is no use talking" and "he didn't know at what time" Grayslake would "even consider" allowing petitioner's connection. T. 753. The mayor "kept pounding on the table, and said, 'I'm going to determine who goes into that sewer.' " T. 752.

Round Lake Park appealed the denial to the Lake County Board, which referred it to the Board's Public Service Committee. A. 5a. Outside counsel for the Board then rendered an opinion that the unique extraterritorial veto power the County had conferred on Grayslake appeared to be illegal because "the Agreement vests the Village with entirely arbitrary authority and therefore could be held void, in whole or in part, should its legality be challenged," and also "may constitute a violation of the federal antitrust laws." Pl. Ex. 113. The Committee prepared to refer the matter to the State's Attorney; but after the individual respondents all objected to its doing so, A. 46a-47a, finally "the Committee abandoned further inquiry into the legality of Grayslake's veto power and instructed the County to take the necessary steps to support the contract's validity." A. 6a. Round Lake Park considered bringing a lawsuit to challenge the denial of the sewer connection, but because of lack of funds, and because petitioner was considering a different solution, decided not to do so. T. 490-91.

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other municipalities who do not have the same concern with developments . . . . It is not in Grayslake's interest to allow connections which may preclude some desirable annexation to Grayslake . . . ." Pl. Ex. 111.

Petitioner at that point did not sue, either. Instead, he set about attempting an alternative plan, which was to forgo the sewer connection and instead to construct a small self-contained sewage treatment plant to service his own property. He received approval from Round Lake Park, which in November 1979 obtained an effluent variance from the Illinois Pollution Control Board to permit such a plant, and which in December 1979 signed a contract to have it constructed. A. 47a. But respondents filed objections with the Illinois Environmental Protection Agency, the other necessary approval authority, A. 6a; there was evidence at trial that these objections, which succeeded in blocking approval for the alternative plant, had no relation to environmental concerns, but rather were pressed in bad faith and again designed simply to prevent petitioner from developing his property for the moderate-cost housing that Grayslake did not want.

In 1980, a potential developer of other nearby land, whom the Grayslake Trustees considered an even less desirable neighbor than petitioner, proposed to annex that land to Round Lake Park. Thereupon the Grayslake Trustees passed a formal resolution that "the Village of Grayslake agrees to the connection of the [petitioner's] Unity Ventures Development . . . to the County Interceptor"—provided Round Lake Park would agree to grant Grayslake a veto on the other annexation. A. 47a, 85a. The respondent Mayor of Grayslake, saying that Grayslake wanted to avoid "a shanty town," abruptly telephoned to ask petitioner to persuade Round Lake Park to agree to Grayslake's proposal; he assured petitioner that "the minute the proposal was signed that they would let Alter connect right away to the interceptor." T. 617. The Grayslake mayor "stated that he realized our sewer problems and the predicament that we were in." T. 611. But Round Lake Park annexed the new land, and the

Grayslake Trustees then promptly passed a formal resolution rescinding their conditional offer to consent to petitioner's sewer connection.

Later, as part of the same concerted effort, Grayslake allegedly in bad faith brought a lengthy but unsuccessful [5] suit in an Illinois state court to try to take away the zoning petitioner had obtained six years before.

Throughout the 1978-81 period, Grayslake granted authorizations to developers of several other nearby tracts (which had agreed to be annexed by Grayslake) allowing them to connect to the Northeast Central Interceptor sewer line. T. 304-308. The Grayslake mayor testified that "Any annexation that we took in, there was an understanding you could use the sewer if it's available." T. 306. The Grayslake Trustees stated in writing that they exercised the veto in such a way "that the interests of Grayslake should prevail!" Pl. Ex. 111 (exclamation in original). At all times the Northeast Central Interceptor and its treatment plant had sufficient capacity for petitioner's planned development. T. 365.

By 1981, respondents had succeeded in blocking petitioner's access to the Northeast Central Interceptor for nearly four years, and also in blocking his attempt to construct a self-contained treatment plant. His favorable financing arrangements expired. He filed this suit for damages alleging that respondents by blocking his development through "a series of wrongful acts," A. 43a, had violated the Civil Rights Act by acting under color of law to deny him constitutional guarantees of equal protection and procedural and substantive due process, and

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[5] The trial court in that case ultimately granted judgment on the pleadings for petitioner, and the appellate court affirmed. *People ex rel. Foreman* v. *Village of Round Lake Park*, 1988 Ill. App. 3d Lexis 496 (1988).

also had violated the Sherman Antitrust Act. He did not make any allegation that his property had been "taken."

B. The District Court's Ripeness Ruling.

Prior to trial, respondents moved to dismiss on the ground that the case was not "ripe." The District Court denied the motion, adopting in full the opinion of the United States Magistrate to whom it had been referred, A. 40a, that for sewer connections in Illinois "there is no requirement of a particular formalized application process," A. 25a, and

> "That Alter submitted proposals to the County, and that the County referred them to Grayslake and thereafter declined action based on the reported veto by Grayslake, support the conclusion that a request had been made and denied and that any more formal application would have been futile." A. 25a.

The opinion continued:

> "Even a decision favorable to Alter there would not vindicate his claims here. Alter claims that Grayslake and the County violated his civil rights. The acts complained of have already occurred, and future events would not add significantly to the operative facts necessary for adjudication of the dispute." A. 26a.

Respondents' motion for reconsideration was denied. A. 41a. The District Court made post-trial findings that "[i]n the present case, there was a refusal by Grayslake," and that petitioner had suffered "the denial of sewer hook-up." A. 84a, 93a.

C. The Jury Verdict.

Petitioner presented evidence at trial that his federally protected rights had been violated over a period of four years in at least six ways:

> —By the County's granting the Village of Grayslake an absolute, standardless veto over sewer con-

nections, and in 1976 extending that veto power to apply to property of petitioner that lay inside another municipality.

—By Grayslake's vetoing that connection for no legitimate purpose, but rather to sabotage his development plans, at the same time it was granting approvals to other developers.

—By the County's supporting Grayslake's veto in the face of its own counsel's advice that the veto power was illegal.

—By Grayslake's then filing objections in bad faith to state officials to block construction of a self-contained sewage treatment plant on his own land.

—By Grayslake's later offering, in 1980, to withdraw the veto and approve his sewer connection immediately—provided he could prevail on the Village of Round Lake Park to block another developer—and by then formally rescinding the approval offer.

—By Grayslake's filing in bad faith and forcing him to defend an unsuccessful lawsuit to take away the zoning he had been granted in 1976.

The jury found in petitioner's favor on both the Civil Rights Act and antitrust claims. Based on expert testimony it found that he had incurred damages of $9,500,000, which were trebled pursuant to the Clayton Act, 15 U.S.C. § 15, to $28,500,000.

The verdict was one of the largest ever returned in cases involving actions by officials to block low-cost housing development, and it received national attention.[6] Lake

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[6] See generally Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URBAN LAW. 301, 313, 318-20 (1988). Another commentator observed about this case:

> "This stunning jury verdict against local governments (and three of the named officials) brings panic to the hearts of local officials everywhere. The case, however, is the most extreme example of a 'sewer as leverage' case that one can imagine. Grayslake not only vetoed the application for sewer service

County and Grayslake widely proclaimed that they would be bankrupted if forced to pay, and respondents asked Congress to change the law retroactively to negate petitioner's verdict.[7] Congress declined to do so.[8]

However, after Congress let the jury's verdict stand, and more than two years after the verdict had been rendered, the District Court entered judgment notwithstanding the verdict. It held that petitioner could prevail only if there was "no evidence" of any legitimate governmental purpose. A. 75a. Brushing aside what it called "the slight overbreadth of Grayslake's sphere of influence," A. 80, the District Court held that it believed respondents' testimony that all the officials' actions and motivations had been for the public good, that state-action antitrust immunity should apply, and also that the officials were immune on other claims. It also dismissed petitioner's claim that he had been denied procedural due process, holding that "the procedures used to deny the Unity

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from a system that it did not either own or operate, but it sued to block the development of an alternative system. In short, Grayslake, Lake County, and some of their public officials appeared to have gone to a great deal of trouble to use the sewer system as leverage to implement some sort of a regional no-growth policy. It is an extreme case, which explains the extreme remedy."

Kelly, *Piping Growth: The Law, Economics and Equity of Sewer and Water Connection Policies*, 36 LAND USE LAW & ZONING DIGEST 3, 6 (July 1984).

[7] "[T]he Illinois delegation sought to invalidate the $28.5 million judgment against the Village of Grayslake, Lake County, and municipal officials." Lee, *supra* n. 6, at 318 (footnote omitted); see also *id.* at 313 n.69. "Congressman Crane, who represents the district in which *Unity Ventures* is pending on appeal, stated during the House debates that this judgment, if upheld on appeal, could very well bankrupt Lake County." *Jefferson Disposal Co.* v. *Parish of Jefferson*, 603 F. Supp. 1125, 1130 n.7 (E.D. La. 1985); H.R. Rep. No. 98-965, 98th Cong., 2d Sess. at 10-11 (1984).

[8] See Lee, *supra* n. 6, at 320.

property's sewer hook-up were not fundamentally unfair." A. 93a. Petitioner appealed.

D. The Court of Appeals' Decision.

The Seventh Circuit (Wood, J., with whom Cummings and Eschbach, JJ., concurred) affirmed without considering the propriety of the District Court's reasoning that set aside the jury verdict. Instead, citing this Court's decision in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court of Appeals held that petitioner's claims never became "ripe" under Article III.

The Court of Appeals observed that *Williamson* requires a "final" and "formal" ruling before a "taking" claim for just compensation can be brought. A. 10a. It then held that such a requirement applies with equal force to § 1983 tort claims for denials of equal protection of the laws, procedural due process, and substantive due process. The Court of Appeals decided that petitioner had never obtained a decision sufficiently "final" to satisfy Article III—even though the District Court had found that petitioner had been denied a sewer connection, A. 84a, 93a, and the jury on a specific instruction had considered and rejected respondents' defense that petitioner had "never properly sought sewer services," T. 2383-84. Focusing on the initial veto of a connection by Grayslake, and without discussing the rest of the "series of wrongful acts," A. 43a, the Court of Appeals said that petitioner should have taken more steps at the beginning, ten years previously, to obtain sewer access, and that "[a]t the very least, Alter should have sought formal approval of his request for a sewer connection from the Grayslake Board of Trustees," A. 12a—whose actions were what petitioner was complaining of, and which had turned him down twice in writing, once by formal resolution, and once through its Mayor orally. The Court of Appeals so held even though Illinois law sets no procedure

for either applying for or challenging the refusal to grant a sewer connection. A. 25a.[9]

As for the Sherman Act conspiracy verdict, the Court of Appeals simply noted:

> "Our discussion of ripeness in connection with the plaintiffs' equal protection and due process claims applies equally to their antitrust claim." A. 13a.

The only authority it cited was a Third Circuit case which, the Court of Appeals acknowledged, passed over the point "without discussion." A. 13a.[10] Rehearing was denied. A. 96a.

REASONS FOR GRANTING THE WRIT

This case presents a recurrent and fundamental question that this Court specifically left undecided in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 182 n.4 (1985), and as to which the Circuits are divided: whether a § 1983 Civil Rights Act plaintiff who is not claiming a "taking" of property must obtain the same formal rulings as in a "taking" case before Article III allows suit for damages from past denials of equal protection and due process. One other Circuit besides the Seventh here extends *Williamson* to equal protection and due process claims; at least four other courts of appeals, plus district courts in three other

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[9] The Court of Appeals also said that petitioner in addition should have sought a connection to a more distant sewer line servicing another part of the County, the Northwest Interceptor, which undisputed testimony had established would have violated state and federal area assignments and would have been vastly more expensive. A. 12a.

[10] *Suburban Trails, Inc.* v. *New Jersey Transit Corp.*, 800 F.2d 361, 368 (3d Cir. 1986). The Seventh Circuit of course did not discuss this Court's subsequent holding in *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988). See p. 27, *infra*. In dictum the court added that it would have held the antitrust claim barred by state-action immunity. A. 16a.

Circuits, do not.[11] The Court of Appeals here has also ignored several subsequent decisions of this Court that explicitly distinguish *Williamson* and strongly suggest that the *Williamson* requirements applicable to "taking" cases do not govern other civil rights claims. *E.g.*, *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S.Ct. 2378 (1987).

In addition—contrary to this Court's holdings that § 1983 does not require civil rights plaintiffs to exhaust state remedies, *e.g.*, *Felder* v. *Casey*, 108 S.Ct. 2302 (1988), and *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982)—this case creates a further conflict as to whether, in a case where no prescribed state review procedures exist, § 1983 plaintiffs from now on must invent and then exhaust reconsideration procedures before coming to federal court. The Seventh Circuit here says, yes; the Second and Ninth clearly say, no.

Finally, after the Seventh Circuit's decision, this Court decided *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988), establishing that, in light of the fact that the Sherman Act punishes the act of conspiring to restrain trade, no official decision at all is required before suit under that statute may be brought. The Seventh Circuit here decided that, to the contrary, Article III "ripeness" requirements of "formal" and "final" rulings borrowed from "taking" cases now also bar Sherman Act actions for conspiracies —presumably including not just civil treble-damage suits, but Sherman Act criminal prosecutions as well. That holding is so broad in its scope and so clearly at odds with this Court's subsequent one that summary remand is appropriate.

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[11] One other district court has commented that "*Williamson* is or may be a puzzle to me," *HMK Corp.* v. *County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985), and another that "I note that I am not the first judge to have difficulty applying the *Williamson County* doctrine." *Kaiser Dev. Co.* v. *City and County of Honolulu*, 649 F. Supp. 926, 941 n.18 (D. Haw. 1986).

I. THE SEVENTH CIRCUIT'S RESTRICTION ON CIVIL RIGHTS ACT SUITS CONFLICTS WITH DECISIONS OF THE SECOND, THIRD, EIGHTH, AND NINTH CIRCUITS, AND DISTRICT COURT HOLDINGS IN THE FIRST, TENTH, AND ELEVENTH.

A. There Is a Conflict as to Whether *Williamson*'s Requirements Apply to Non-"Taking" § 1983 Cases.

The conflict in the Circuits that has been widened [12] by the Seventh Circuit's interpretation of *Williamson* as applied to 42 U.S.C. § 1983 could not be clearer. Where there is proof that local officials have inflicted damage by any of a variety of actions that denied equal protection or due process—and a long series of such concerted actions was demonstrated here—then other Circuits routinely recognize that damage has occurred and grant a remedy under § 1983, regardless of what later procedures or ultimate rulings might follow. For example:

—Five months ago, in a case where a property-owner sued under § 1983 for damages from city officials who he alleged had denied him due process by withholding a zoning exemption, the Third Circuit held that "a ripe controversy exists" even though the denial itself was not final, and indeed when the officials subsequently changed their minds and actually *granted* the exemption. *Neiderhiser* v. *Borough of Berwick*, 840 F.2d 213, 217 (3d Cir.

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[12] Another Circuit, the Sixth, in an unpublished opinion reversing a district court, has without discussion taken the same view as the Seventh here, that *Williamson* applies to all § 1983 claims across the board, not just to "taking" cases. *Weaver* v. *Anderson County Fiscal Court*, noted 838 F.2d 1216 (6th Cir. 1988), op. not for pub. at 1988 U.S. App. Lexis 1768, *reversing* 648 F. Supp. 1575, 1579 n.3 (E.D. Ky. 1986). The Seventh Circuit relied on language in a Ninth Circuit case as support; however, the Ninth Circuit's analysis and holding there are directly in conflict with the Seventh Circuit's here. See pp. 20-21, *infra*.

1988), *pet'n for cert. pending*, No. 87-1969. The Third Circuit explained

> "that Hollywood has stated a cause of action for violation of its due process and free expression rights under section 1983, and that its claim for damages flowing therefrom demonstrates that a live case or controversy exists. It does not matter that the Board has since reversed itself and granted the zoning exemption; if Hollywood's allegations are true and the denial deprived Hollywood of any constitutional right, even temporarily, the denial would be compensable . . . ." *Id.* at 218-19 (footnote omitted).

And in another recent Third Circuit case, *Bello* v. *Walker*, 840 F.2d 1124 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1968, that court held that even though a developer later succeeded in obtaining the building permit he sought, his § 1983 due process claim would still be heard based on allegations "that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process." 840 F.2d at 1129.

—In two decisions the Eighth Circuit also has rejected the conclusion of the Court of Appeals here that the "ripeness" rule that *Williamson* applied to "taking" claims should be extended to due process and equal protection claims as well. In *Mitchell* v. *Mills County*, 847 F.2d 486 (8th Cir. 1988), property owners sued under § 1983 claiming that county officials had both taken their property and damaged them by denials of due process of law. The Court of Appeals recognized "the takings claim . . . as not yet ripe" under this Court's holding in *Williamson*, *supra*, but then went on to adjudicate the due process claim on the merits. 847 F.2d at 488. And in *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986), the same Court of Appeals again dismissed a "taking" claim as premature under *Williamson*, but held that a § 1983 substantive due process claim based on the

same facts was ripe and should be heard. *Compare* 785 F.2d at 607 *with id.* at 609.

—Whether the *Williamson* "ripeness" requirements should apply to non-"taking" cases also was recently before a district court in a land development case in the Tenth Circuit, which held:

> "Defendants are correct that plaintiff's land has not been condemned. However, their argument that plaintiff's claims are not ripe because the land has not been condemned is without merit . . . . [*D*]*efendants have neglected plaintiff's claims for due process violations which have already occurred.* . . . [P]laintiff has asserted claims based on actions which defendants have allegedly already taken and which purportedly violated plaintiff's rights. Accordingly, defendants' motion to dismiss for lack of jurisdiction, on the ground that plaintiff's claims are not ripe, is denied."

Oberndorf v. *City and County of Denver*, 653 F. Supp. 304, 311 (D. Colo. 1986) (emphasis supplied), *quoting Upah* v. *Thornton Development Authority*, 632 F. Supp. 1279, 1280-81 (D. Colo. 1986). The same conclusion has been reached by district courts in the First and Eleventh Circuits, which have dismissed "taking" claims as unripe under *Williamson* while proceeding to adjudicate § 1983 substantive due process claims. *Lerman* v. *City of Portland*, 675 F. Supp. 11, 15, 17, 19 (D. Me. 1987); *Carroll* v. *City of Prattville*, 653 F. Supp. 933, 942-44 (M.D. Ala. 1987).[13]

It has never been the law under the Civil Rights Act that damages already sustained from an equal protection or due process violation, committed by officials acting under color of state law—the violations alleged and found by the jury under proper instructions here—can be erased by subsequent applications or events. Even if petitioner

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[13] The same recognition that § 1983 suits for due process violations are actionable, even when compensation claims for a "taking"

had done what the Seventh Circuit ten years later said he should have, and had "sought formal approval of his request from the Grayslake Board of Trustees," the very body of whose actions he was complaining; and even if he had somehow finally obtained it—even then, petitioner still would have incurred substantial damage as a result not just of the initial veto, but of the whole series of actions by respondents that the jury found had denied him equal protection of the laws and due process. Courts in at least five Circuits would have allowed him in federal court.

B. There Is a Conflict as to Whether *Williamson* Requires Pursuit of Non-Existent Remedies.

Williamson involved familiar and well-defined zoning procedures, of which variances are an integral part. By contrast, in Illinois there is no formal procedure for obtaining a connection to a public sewer; normally application is made by the municipality to the Public Works Department, as was done (and initially approved) here. A. 5a, 46a. Illinois law provides no administrative review procedure if a sewer connection is not granted. *LaSalle Nat'l Bank* v. *County of Lake*, 579 F. Supp. 8, 10 (N.D. Ill. 1984).

Nevertheless, the Seventh Circuit here held that even though every member of the governing body of Grayslake in writing and orally through the mayor declined in 1978 and 1979 to allow a sewer connection (a position they temporarily offered to change and then later reiterated in 1980), petitioner's claim was not ripe because he should have tried personally in 1978 to persuade them or the Lake County Board to change their minds. Other Circuits, following this Court, hold entirely to the contrary:

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are not, is in pre-*Williamson* decisions of the Fourth and Fifth Circuits. *Suthoff* v. *Yazoo County Indus. Dev. Corp.*, 637 F.2d 337, 340 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982) (due process claim survives when "taking" procedures "instituted but abandoned"); *Scott* v. *Greenville County*, 716 F.2d 1409 (4th Cir. 1983).

—In a Second Circuit case remarkably parallel to the present one, *Sullivan* v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986), a developer brought a § 1983 action for damages for denial of due process based on the failure of town officials to issue an occupancy permit:

> "When Sullivan orally requested certificates of occupancy for his completed houses, he was told both by the building official and by the first selectman that the town would issue no certificates of occupancy for Sullivan's new houses until the roads had been accepted for dedication." 805 F.2d at 85.

Even though "it was within Sullivan's power under Connecticut law to convene a town meeting to consider the question of acceptance," *id.* at 84, and even though he never did so—and even though the occupancy certificates *later were granted*—the Second Circuit held that "it is apparent that triable issues were raised," *id.* at 85, for damages resulting from delay, added taxes, interest and other expenses. The Second Circuit held that a § 1983 cause of action is ready to be heard when "absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted." *Id.* at 85, *quoting Yale Auto Parts, Inc.* v. *Johnson*, 758 F.2d 54, 59 (2d Cir. 1985).

—In the very Ninth Circuit case on which the Court of Appeals here relied as authority, the Ninth Circuit did say in dictum, following an earlier case,[14] that *Williamson*'s finality requirement applies in general terms to equal protection and substantive due process claims. *Herrington* v. *County of Sonoma*, 834 F.2d 1488, 1494 (9th Cir. 1987). But the Ninth Circuit's opinion then went on to *hold* that finality is defined differently in non-"taking" cases—and in particular that in non-"taking" cases finality and ripeness do not require any application

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[14] *Kinzli* v. *City of Santa Cruz*, 818 F.2d 1454 (9th Cir.), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 775 (1988).

to anyone for further consideration after a denial. 834 F.2d at 1497. Holding the equal protection and due process claims "ripe for adjudication," *id.* at 1499, the Ninth Circuit explained, in an analysis irreconcilable with the Seventh Circuit's here:

> "Indeed, the [Supreme] Court expressly stated that the plaintiff's substantive due process, procedural due process, and equal protection claims were not at issue. *Williamson*, 473 U.S. at 182 n.4, 105 S. Ct. at 3114 n.4.
>
> "*Williamson* also holds that a *taking* claim in federal court is not ripe until the plaintiff has sought 'just compensation' from state entities. *Williamson*, 473 U.S. at 194-97, 105 S. Ct. at 3121-22. This requirement does not apply to the due process and equal protection claims at issue here." 834 F.2d at 1499 nn.9, 10 (emphasis in original).

It concluded, exactly contrary to the Seventh Circuit here, that

> "Because the Herringtons' claims are not premised on such an assertion [that all use of property had been denied], *Williamson does not require us to apply the identical ripeness standard for takings to the Herringtons' substantive due process, procedural due process and equal protection claims.*" 834 F.2d at 1499 (emphasis supplied; footnote omitted).

The Ninth Circuit emphasized that "[t]aking claims and substantive due process claims are not fungible." *Id.* at 1498 n.7.

Also contrary to the Seventh Circuit here, the Ninth Circuit separately expressed doubt that *Williamson* would apply at all to a § 1983 claim for denial of procedural due process, observing that "it is not clear that the Herringtons should be required to wait until a 'final decision' about their land has been made before challenging the decision-making process." *Id.* at 1495.

II. THE SEVENTH CIRCUIT'S RESTRICTION ON CIVIL RIGHTS ACT SUITS IS IN CONFLICT WITH DECISIONS OF THIS COURT.

A. The Seventh Circuit Has Created a New Exhaustion Requirement That Disregards *Felder* v. *Casey* and *Patsy* v. *Board of Regents*.

The Seventh Circuit's holding at best confuses and at worst undermines the application of federal civil rights protection under 42 U.S.C. § 1983.

In *Patsy* v. *Board of Regents*, 457 U.S. 496 (1982), and *McNeese* v. *Board of Educ.*, 373 U.S. 668 (1963), this Court held that exhaustion of state remedies is *not* a prerequisite to actions for denials of equal protection or due process under § 1983. Just this past Term this Court, citing *Patsy*, reiterated "the dominant characteristic of civil rights actions: *they belong in court.*" *Felder* v. *Casey*, 108 S. Ct. 2302, 2312 (1988), *quoting* (with emphasis added by this Court) *Burnett* v. *Grattan*, 468 U.S. 42, 50 (1984).

Here the Seventh Circuit, although using the vocabulary of "finality" and eschewing the word "exhaustion," clearly threw this § 1983 plaintiff out of court for failure to exhaust what the Court of Appeals hypothesized might be additional remedies. The District Court, as well as the jury, had found on ample evidence that proper application had been made and would have been granted except that there had been "a refusal by Grayslake," A. 84a, and that consequently petitioner had suffered "denial of sewer hook-up," A. 93a, which one of respondents described as petitioner's "predicament," T. 611. The Court of Appeals itself acknowledged, as the District Court had found, that the connection had initially been "approved," A. 6a, 46a, by the responsible County officials, but then denied solely because of what the Court of Appeals called "Grayslake's rebuff," A. 6a, one of the "series of wrongful acts" that petitioner alleged violated his federally protected rights. A. 43a. The record could scarcely be clearer.

The Court of Appeals decided that petitioner should in addition have personally sought an audience with the Grayslake Board, which the District Court found had already considered and declined to consent, and asked them to reconsider. A. 12a. But their exercise of arbitrary, standardless power was exactly one of the due process and equal protection violations at issue; petitioner's claim was ripe as soon as they took over to block him. Last Term in *Felder* v. *Casey, supra*, this Court held:

> "Given the evil at which the federal civil rights legislation was aimed, there is simply no reason to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights . . . could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries." 108 S. Ct. at 2311.

The Seventh Circuit's holding totally undercuts that case and *Patsy*. It contradicts this Court's holdings that § 1983 does not "force[] injured persons to seek satisfaction from those alleged to have caused the injury in the first place." *Felder* v. *Casey, supra*, 108 S. Ct. at 2312. Indeed, even in "taking" cases, "[a] property owner is of course not required to resort to . . . unfair procedures in order to obtain this determination." *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 350 n.7 (1986).[15] This is particularly so when, as here, respond-

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[15] *Accord, e.g., Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982); *Glover* v. *St. Louis-San Francisco Ry.*, 393 U.S. 324, 330-31 (1969); *Houghton* v. *Shafer*, 392 U.S. 639, 640 (1968); *King* v. *Smith*, 392 U.S. 309, 312 n.4 (1968). See also *First English Evangelical Lutheran Church, supra*, 107 S. Ct. at 2399 (Stevens, J., dissenting):

> "In my opinion, it is the Due Process Clause rather than that [taking] doctrine that protects the property owner from improperly motivated, unfairly conducted, or unnecessarily protracted governmental decisionmaking. Violations of the procedural safeguards mandated by the Due Process Clause will give rise to actions for damages under 42 U.S.C. § 1983 . . . ."

ents themselves conceded that such efforts would have been futile.[16] Invoking finality, the Seventh Circuit here really imposed a new kind of exhaustion requirement, demanding exhaustion even of state remedies that do not exist.

B. *Williamson* and Later Decisions of This Court Specifically Distinguish "Takings" From Other § 1983 Claims.

The Seventh Circuit assumed that all the *Williamson* requirements applied because "[a]lthough the plaintiffs' suit is not premised on a takings claim," nevertheless "the ripeness analysis used in those [taking] cases applies as well to equal protection and due process claims." A. 9a. This Court has rejected that assumption. In fact, last year in *Nollan* v. *California Coastal Comm'n*, 107 S. Ct. 3141, 3147 n.3 (1987), referring to "taking" cases, this Court specifically admonished:

> "our opinions do not establish that these standards are the same as those applied to due process or equal-protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different."

In *Williamson* itself, this Court twice took pains specifically to differentiate its "taking" holding from cases like this one involving § 1983 claims based on equal protection and due process, observing that "[t]hose issues are not before us," 473 U.S. at 182 n.4, and adding that the measure of damages might well be different "if respondent's cause of action were viewed as stating a claim under the Due Process Clause," *id.* at 183 n.6. The ripeness requirements for "taking," this Court explained, were a special situation "compelled by the very nature of the inquiry required by the Just Compensation Clause,"

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[16] Asked whether the Board would have changed its mind, one of the respondents testified, "I'm not suggesting it, no." T. 1343. Another, when asked if any document "remotely suggests" such a possibility, testified, "Not to my knowledge." T. 1484.

which includes "factors [that] simply cannot be evaluated until the administrative agency has arrived at a final, definitive position;" until then, in a "taking" case, there is no way to evaluate or know "whether respondent 'will be unable to derive economic benefit' from the land." *Id.* at 190-91.[17] And as this Court also recognized in *Williamson*, but the Seventh Circuit here did not, when "the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury," then finality is satisfied, and *Patsy* bars any further exhaustion requirement. *Id.* at 193.

This Court later summarized *Williamson* as a situation in which "factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 107 S.Ct. 2378, 2383 (1987); *accord*, *id.* at 2395 (Stevens, J., dissenting). And in *Pennell* v. *City of San Jose*, 108 S.Ct. 849, 859 (1988), this Court last Term again distinguished between a "taking" claim, which it held was premature, and equal protection and due process claims, which it held were not and should be decided on the merits.[18]

A "taking" case, in other words, is not ripe until a taking has been completed. But equal protection and due process violations are different. Such "§ 1983 claims are

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[17] In *Williamson* this Court did note that when a substantive due process claim essentially duplicated a "taking" claim, by alleging that "it has the same effect as a taking," the "taking" rule should apply. See 473 U.S. at 199-200. But such is not the case here. The acts complained of include a variety of tortious actions, over four years, not just the initial refusal to approve by Grayslake. Moreover, they encompass equal protection and procedural due process violations as well.

[18] *Cf.* also *Carey* v. *Piphus*, 435 U.S. 247, 264-65 (1978): "the elements and prerequisites for recovery of damages appropriate to compensate injuries caused by the deprivation of one constitutional right are not necessarily appropriate to compensate injuries caused by the deprivation of another."

best characterized as personal injury actions." *Wilson* v. *Garcia*, 471 U.S. 261, 280 (1985). "We have repeatedly noted that 42 U.S.C. § 1983 creates 'a species of tort liability' . . . . [W]hen § 1983 plaintiffs seek damages for violations of constitutional rights, the level of damages is ordinarily determined according to principles derived from the common law of torts." *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 305-06 (1986) (footnote omitted) (§ 1983 suit for suspension even though plaintiff was reinstated), *quoting in part Carey* v. *Piphus*, 435 U.S. 247, 253 (1978), and *Imbler* v. *Pachtman*, 424 U.S. 309, 417 (1976). Tort claims ripen when damage is inflicted. They are not "takings," which must run their full course to be measured, and even to be certain that they have occurred.

III. THE SEVENTH CIRCUIT'S RESTRICTION ON SHERMAN ACT SUITS HAS SWEEPING IMPLICATIONS, AND CONFLICTS WITH MANY HOLDINGS OF THIS COURT AND THE COURTS OF APPEALS.

The Seventh Circuit's holding that without a final and formal administrative ruling there can be no Sherman Act claim ignores the purpose of that Act and squarely conflicts with this Court's subsequent decision last Term in *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988). There a physician claimed that a hospital peer-review process violated the Sherman Act. The process was not completed before his antitrust suit was filed, and in fact was never completed:

> "Before the committee rendered its decision, petitioner resigned from the hospital staff rather than risk termination.
>
> "During the course of the hospital peer-review proceedings, petitioner filed this lawsuit . . . . Petitioner alleged that the partners of the Astoria Clinic had violated §§ 1 and 2 of the Sherman Act . . . ." 108 S. Ct. at 1661.

If the Sherman Act claim of the physician plaintiff, who did not complete the review process, was ripe for adjudication in *Patrick* v. *Burget*, then certainly petitioner's claim was here. The two cases are simply not reconcilable on the point, and the Seventh Circuit's ruling should either be granted review on certiorari, or vacated and remanded for reconsideration in light of the subsequent decision in *Patrick* v. *Burget*.[19]

The casual brushing off of the Sherman Act issue by the Seventh Circuit here on "ripeness" grounds is also a far-reaching precedent in conflict with the law as applied for decades in the other courts of appeals. To list only a few recent examples:

—The Ninth Circuit has held, along with many other courts, that "the Sherman Act punishes the mere act of conspiring." *United States* v. *Miller*, 771 F.2d 1219, 1226 (9th Cir. 1985).

—The Eighth Circuit has recently held that "a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed," and "it remains actionable until its purpose has been achieved or abandoned." *United States* v. *Northern Improvement Co.*, 814 F.2d 540, 542 (8th Cir.), *cert. denied*, 108 S.Ct. 141 (1987), *quoting in part United States* v. *Inryco*, 642 F.2d 290, 293 (9th Cir. 1981), *cert. dismissed*, 454 U.S. 1167 (1982).[20]

—In *Oberndorf* v. *City and County of Denver*, 653 F. Supp. 304, 311 (D. Colo. 1986), also a land-use suit

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[19] If this Court does vacate and remand, the Court of Appeals should also be directed to reconsider its *Williamson* interpretation in light of the later holdings in *Nollan*, *First English Evangelical Lutheran Church*, and *Pennell* v. *City of San Jose*. See pp. 24-25, *supra*.

[20] Similarly, once the Sherman Act conspiracy is formed, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953).

against municipal officials under the Sherman Act, the same reasoning accepted by the Seventh Circuit here was expressly rejected, the court concluding that "these claims are ripe."

The Court of Appeals' dangerous reinterpretation of the Sherman Act in the name of Article III is contrary to all reasoned authority.[21] Moreover, if followed it presumably would place many conspiracies in restraint of trade beyond prosecution under the criminal penalties of the Sherman Act as well. Such a constitutional holding limiting the reach of the country's basic antitrust law is a reason, standing alone, sufficient for grant of certiorari in this case.

IV. THE ISSUES ARE IMPORTANT.

The distortion of ripeness doctrine here reflects a fundamental misunderstanding of Article III, with wide ramifications across the board of federal jurisdiction. More particularly, in the way it applies Article III to suits under the Civil Rights Act to open up housing, and under the Sherman Act against conspiracies to restrain trade, the decision invites evasion of federal fairness responsibilities if officials now can avoid suit by surrounding otherwise actionable obstructions with an unending

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[21] The Court of Appeals cited only one case as support for its holding that a plaintiff cannot recover for damages from a § 1 Sherman Act conspiracy without exhausting the very procedures he is claiming are illegal. And even that case, the Court of Appeals acknowledged, dealt with the point "without discussion." A13a. The cited decision, *Suburban Trails, Inc.* v. *New Jersey Transit Corp.*, 800 F.2d 361 (3d Cir. 1986), really did not go even that far, holding that the case concerned a "unique circumstance" of "primary jurisdiction of UMTA" that was "intermingled with considerations of federalism," that no Sherman Act violation could occur unless the Urban Mass Transportation Act, 49 U.S.C. §§ 1601 *et seq.*, was inapplicable, and that such a determination required adherence to the administrative procedure Congress prescribed under the UMTA. 800 F.2d at 366, 367, 369.

fog of unpredictable procedural obstacles. Such evasions of § 1983 have not been permitted in other equal protection contexts. *E.g.*, *School Board* v. *Allen*, 240 F.2d 59, 63-64 (4th Cir. 1956) (Parker, C.J.), *cert. denied*, 353 U.S. 910 (1957); *McNeese* v. *Board of Educ.*, *supra*. They should not block constitutional claims here, either. *MacDonald, Sommer & Frates* v. *County of Yolo*, *supra*.

Wholly misconstruing *Williamson*, the Seventh Circuit has hobbled the practical enforcement of basic federal rights, and that calls for review by this Court.

CONCLUSION

For the reasons stated, certiorari should be granted, and the judgment vacated or the case set for argument.

Respectfully submitted,

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August 15, 1988

88-282

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM ALTER, UNITY VENTURES, and
LASALLE NATIONAL BANK,
Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY,
GEORGE BELL, VILLAGE OF GRAYSLAKE,
and COUNTY OF LAKE,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 86-1620 and 86-1706

UNITY VENTURES, an Illinois partnership, LASALLE NATIONAL BANK, as Trustee under Trust No. 103331, and WILLLAM ALTER,
Plaintiffs-Appellants,

v.

COUNTY OF LAKE, VILLAGE OF GRAYSLAKE, NORMAN C. GEARY, GEORGE BELL and EDWIN M. SCHROEDER,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 81 C 2745—Nicholas J. Bua, *Judge*

ARGUED FEBRUARY 25, 1987—DECIDED MARCH 9, 1988

Before CUMMINGS and WOOD, JR., *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge.* The plaintiffs, Unity Ventures, LaSalle National Bank, and William Alter, sued defendants Village of Grayslake, Lake County, and three officials under the fourteenth amendment to the United

States Constitution, 42 U.S.C. § 1983, and the Sherman Act, 15 U.S.C. § 1. The plaintiffs allege that the defendants improperly denied plaintiffs' request for sewage service in order to control the use of plaintiffs' property, violating the plaintiffs' rights to equal protection, substantive and procedural due process, and section one of the Sherman Act. After trial, the jury returned verdicts against all defendants on the equal protection, substantive due process, and antitrust claims. The court trebled the jury's award of $9,500,000 in damages under the antitrust count and on January 16, 1984, entered judgment on the verdict in favor of plaintiffs in the amount of $28,500,000. Defendants filed a timely motion for judgment notwithstanding the verdict or a new trial. On March 19, 1986, the district court granted defendants' motion for judgment n.o.v., denied their motion for a new trial, and denied plaintiffs' procedural due process claims and their request for injunctive relief. Plaintiffs have appealed, raising the following issues: (1) whether there was sufficient evidence to support the jury's finding that defendants violated plaintiffs' rights to substantive due process and equal protection; (2) whether defendants violated plaintiffs' rights to procedural due process by failing to provide plaintiffs with notice and an opportunity to be heard before denying their request for sewer hookups, and by failing to articulate standards for their decision; (3) whether the evidence supported the jury's finding that defendants' agreement on the provision of sewage treatment services eliminated competition between municipalities and between developers, in violation of section one of the Sherman Act; and (4) whether defendants' anticompetitive conduct constituted state action and was therefore immune from the antitrust laws. Defendants have cross-appealed from the denial of their motion for a new trial. We affirm the district court's judgment notwithstanding the verdict on the grounds that the plaintiffs' claims were not ripe for adjudication.

I. STANDARD OF REVIEW

Our review of the "district court's decision to enter a judgment n.o.v. must be . . . *de novo*." *Graefenhain v. Pabst Brewing Co.*, 827 F.2d 13, 15 (7th Cir. 1977). We do not, however, judge the credibility of the witnesses, or substitute our judgment on the weight of the evidence for that of the jury. *La Montagne v. American Convenience Prods.*, 750 F.2d 1405, 1410 (7th Cir. 1984). Our task is to determine whether the evidence, and all reasonable inferences which may be drawn from it, is substantial enough to support the jury's verdict, "when viewed in the light most favorable to the non-moving party." *Graefenhain*, 827 F.2d at 15. With this standard in mind, we turn to a brief discussion of the facts of the case.

II. FACTUAL BACKGROUND

We draw our discussion of the facts, in large part, from the district court's opinion. *Unity Ventures v. County of Lake*, 631 F. Supp. 181 (N.D. Ill. 1986).

In 1972, Alter obtained an option to purchase 585 acres of farmland (the Unity property) in an unincorporated area of Lake County, Illinois. The Unity property was south of Grayslake and southeast of Round Lake Park. On August 15, 1976, Alter and Round Lake Park entered into an annexation agreement providing for development of the Unity property. The Village adopted an ordinance annexing the property and Alter contributed land and money to the Village for municipal facilities. Alter exercised his option to purchase the Unity property on October 21, 1976.

In 1973 Lake County completed a plan for a system of regional sewage treatment plants. Under the plan, unincorporated and annexed properties would be served through an off-site connection: an underground pipe would extend from the property or municipality to the

main interceptor, a large underground pipe that connected to the treatment plant serving that area. Two principal interceptors would serve central Lake County. The Northeast Central Interceptor was designed to serve the area of Grayslake and communities along its path to a new sewage treatment plant in Gurnee, Illinois. The Northwest Central Interceptor would serve the area of Round Lake Park and communities along its path to another new treatment plant in Fox Lake, Illinois. The Unity property, under grants approved by the Illinois Environmental Protection Agency (IEPA), the terms of the revenue bond issue, and regional construction plans, was located in the proposed Northeast Interceptor's service area.

Lake County and the Village of Grayslake agreed, on April 20, 1976, that the County would provide service to Grayslake through the Northeast Interceptor. The County granted to Grayslake jurisdiction over a "sphere of influence" including unincorporated areas in Lake County adjacent to Grayslake. The Village had the right to approve all connections to the County's Northeast Interceptor from this area. The County and the Village agreed that "[t]he County shall preserve the function of County interceptors located within the sphere of influence of the Village . . . by not permitting any direct connection hereto by any person, firm, corporation or municipality unless the Village consents in writing to such direct connection." *Unity Ventures*, 631 F. Supp. at 185. The 1976 agreement reflected some changes in the sewage disposal arrangement that the parties had reached in 1973. The word "municipality" was an addition, and Grayslake's sphere of influence was increased to include the Unity property and a 2,500-acre parcel in unincorporated Lake County known as the Heartland property. The district court found that neither the plaintiffs nor Round Lake Park officials knew of the sphere of influence agreement between Grayslake and Lake County until October of 1978. *Id.* at 186.

In August of 1978 Alter submitted to the Lake County Public Works Department two plans for the construction of a connection between the Unity property and the Northeast Interceptor. One plan provided for a connection to serve only the Unity property for which Alter would pay the construction costs. The second plan provided for a connection to serve both the Unity property and the Heartland property which lay between Unity and Grayslake. Alter would pay for the bulk of this sewer with Grayslake paying only for the additional costs of oversizing to accommodate the larger area. Martin Galantha, Director of the Lake County Public Works Department, approved the plans and sent them on to Mayor Edwin M. Schroeder for Grayslake's approval according to the sphere of influence agreement. Galantha also sent a letter indicating that although Round Lake Park generally would be served by the Northwest Interceptor, the Unity property, because it lay within the Des Plaines River basin, "should be tributory [sic] to the County's Northeast Central interceptor system." *Id.* (quoting Plaintiffs' Exhibit 50).

The plaintiffs learned of the sphere of influence agreement on October 31, 1978, at a meeting with Galantha, Mayor Schroeder, Mayor Walter Bengson of Round Lake Park, and others to discuss Alter's proposals. Mayor Schroeder declined to consent to Unity's connection into the Northeast Interceptor at that time.

Round Lake Park appealed Grayslake's veto of Alter's requested sewage connection to the Lake County Board through Joseph Tobolik, Round Lake Park's representative on the Board. On March 16, 1979, the Board's Public Service Committee obtained a legal opinion from the law firm of Chapman & Cutler as to the propriety of Grayslake's veto power. Chapman & Cutler found the sphere of influence agreement to be of questionable legality. Because it vested Grayslake with arbitrary authority, the agreement could violate the requirements of due process

and, moreover, according to the opinion, if the agreement was not considered to be an exercise of state action it might violate the antitrust laws as well. After receiving this opinion, the Public Service Committee sought the State's Attorney's advice about its legal options. Ultimately, the Committee abandoned further inquiry into the legality of Grayslake's veto power and instructed the County to take the necessary steps to support the contract's validity.

Following Grayslake's rebuff, plaintiffs and Round Lake Park proceeded with alternate plans to provide sewage treatment facilities for the Unity property. On August 29, 1976, Round Lake Park filed a petition for variance with the Illinois Pollution Control Board, requesting permission to construct a sewage treatment plant to serve the Unity property. The defendants did not file any objections. In November of 1979, the Pollution Control Board granted the variance without objection. In December of 1979, Round Lake Park entered into an agreement with a sewer company to construct the plant.

While the plaintiffs were engaged in these efforts, the developer of the Heartland property had been negotiating an annexation with Grayslake officials. In November of 1980, after several years of unsuccessful negotiations with Grayslake, the Heartland's developer sought annexation by Round Lake Park. Faced with the prospect of losing Heartland, the Grayslake Board of Trustees on December 22, 1980, adopted a resolution that Grayslake would consider allowing the Unity property to connect to the Northeast Interceptor if Round Lake Park would agree not to annex Heartland without Grayslake's consent. Round Lake Park rejected this offer on January 3, 1981, and on January 14, 1981, Round Lake Park passed a resolution to authorize Heartland's annexation.

Five days later Lake County and Grayslake filed with the IEPA objections to construction of the sewage treat-

ment plant to serve the Unity property. The Grayslake trustees on February 2, 1981, unanimously rescinded their earlier resolution to consider allowing the Unity property to connect to the Northeast Interceptor. On June 3, 1981, the defendants filed an action in the Circuit Court of Lake County challenging the validity of Round Lake Park's zoning and annexation of Heartland. (The complaint was later amended to include a challenge to Round Lake Park's zoning of plaintiffs' property.)[1] On May 15, 1981, plaintiffs filed this suit.

III. DISCUSSION

A. Ripeness of Constitutional Issues

The defendants, in an early motion to dismiss, argued among other things that the plaintiffs' claims were not ripe for adjudication. The district court denied the motion. No discussion of the ripeness issue appears in the district court's opinion. Ripeness, as an element of the case or controversy requirement of Article III of the Constitution, is an issue we must address. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 138 (1974). Since this case was tried, the Supreme Court has discussed the doctrine of ripeness on two occasions. The decisions in those cases, and a recent Ninth Circuit opinion convince us that this case is indeed not yet ripe for our consideration. *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987). The Ninth Circuit explained the principle behind the ripeness doctrine as follows:

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[1] On December 22, 1986, judgment was entered for defendants (plaintiffs in this case). *People ex rel. Foreman v. Village of Round Lake Park*, No. 81 CH 392B (19th Cir. Ct., Lake Cty., Ill. Dec. 22, 1986). According to the plaintiffs in this case, the judgment has been appealed to the Illinois Appellate Court for the Second District.

> In land use challenges, the doctrine of ripeness is intended to avoid premature adjudication or review of administrative action. It rests upon the idea that courts should not decide the impact of regulation until the full extent of the regulation has been finally fixed and the harm caused by it is measurable.

Herrington, 834 F.2d at 1494.

The Supreme Court's recent discussion of ripeness has been in the context of regulatory taking claims. In one such case, the Court stated that a plaintiff "must establish that the regulation has in substance 'taken' his property . . . [and] that any proffered compensation is not 'just.'" *Yolo County*, 106 S. Ct. at 2566 (citations and footnote omitted). "[A]n essential prerequisite to a takings claim is a final decision by the government as to what use of the property will be allowed." *Id.* In order for a plaintiff to maintain a suit, the government's use determination must be one "which inflicts a concrete injury on the plaintiff." *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1454 (9th Cir. 1987). The *Kinzli* court has interpreted the final decision requirement to include "(1) a rejected development plan, and (2) a denial of a variance." *Id.* (citing *Williamson*, 473 U.S. at 187-90). The Ninth Circuit applied this test in *Kinzli* to dismiss the plaintiffs' taking claim because they had "neither submitted a development plan nor applied for a variance." 818 F.2d at 1455. The *Kinzli* court similarly found that plaintiffs' equal protection and substantive due process claims were not ripe, and because the substantive due process claim was not ripe there could not yet be a denial of procedural due process. *Id.* at 1456; *see also Williamson*, 473 U.S. at 199-200.

Plaintiffs here do not allege that Grayslake and Lake County have "taken" their property. They argue that the denial of a sewer connection to the Northeast Interceptor was not based on any discernible standards and vio-

lated their rights to equal protection and substantive due process. Moreover, they contend, their rights to procedural due process also were violated because they did not receive notice and an opportunity to be heard before the denial.

Although the plaintiffs' suit is not premised on a takings claim, as were the *Yolo County*, *Williamson*, and *Kinzli* cases, we agree with the Ninth Circuit in *Herrington* that the ripeness analysis used in those cases applies as well to equal protection and due process claims. *Herrington*, 834 F.2d at 1494. The plaintiffs in *Herrington* initially brought suit under 42 U.S.C. § 1983 against Sonoma County asserting that the County's denial of their development plan "effected a taking of their property without just compensation." *Id.* at 1493. The Herringtons, like plaintiffs here, also claimed violations of their rights to equal protection and substantive and procedural due process.[2] After the close of evidence at trial the Herringtons abandoned their taking claim; the case was thus decided and appealed only on the equal protection and due process issues. We believe the Ninth Circuit's analysis of these issues is persuasive, and we adopt the reasoning of the *Herrington* opinion.

A final decision must be demonstrated by a development plan submitted, considered, and rejected by the governmental entity. Because plaintiffs here are challenging defendants' denial of a sewer connection, this requirement can be met by a rejected application or pro-

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[2] Because the plaintiffs invoke no fundamental right and posit no suspect classification, they are not entitled to the higher level of scrutiny that attaches to those kinds of equal protection claims. *See, e.g., Village of Belle Terre v. Borass*, 415 U.S. 1 (1974). The parties here seem to agree that the same standards apply in the ordinary equal protection analysis as apply to substantive due process challenges. *See, e.g., Griffin High School v. Illinois High School Ass'n*, 822 F.2d 671, 674-76 (7th Cir. 1987). The regulation must bear a rational relation to a legitimate state interest. *Id.*

posal for the connection. Plaintiffs are unable to meet this requirement. Alter's efforts to obtain a sewer connection for the Unity property did not include a formal application to either Grayslake or Lake County, and thus did not result in a final decision.

Alter submitted two plans to Martin Galantha, director of the Lake County Public Works Department. Galantha approved of the plans and set them to Mayor Schroeder of Grayslake for the Village's approval in accordance with the sphere of influence agreement. When Alter met with Mayor Schroeder and others October 31, 1978, Schroeder, speaking with the knowledge and approval of the Board of Trustees, told him that Grayslake would not consent at that time to the Unity property connecting to the Northeast Interceptor. In a letter to the County Board Schroeder mentioned Grayslake's concerns about the sewer's capacity to accommodate the property of developers interested in annexing to Grayslake. He stated, however, that "[a]s a matter of record Grayslake has never taken the position that it will never consent to the connection by Unity Ventures." Alter made no formal application to the Village Board of Trustees. Neither did he approach the Lake County Board to apply for a connection. Nor did he file a request with the IEPA to approve a connection to the Northeast Interceptor.

Round Lake Park generally was located in the area to be served by the Northwest Interceptor. The Unity property, although tributary to the Northeast Interceptor, was politically part of Round Lake Park. Alter, however, never applied for connection to the Northwest Interceptor. Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity on his application for a sewer connection. He asserts that further efforts to apply to the County, the IEPA, or the North Shore Sanitary District would have been "a useless act."

The Ninth Circuit has ruled that the final decision requirement may be met with proof that attempts to comply would be futile. *Kinzli*, 818 F.2d at 1454; *Martino v. Santa Clara Valley Water Dist.*, 703 F.2d 1141, 1146 n.2 (9th Cir.), *cert. denied*, 464 U.S. 847 (1983). The Ninth Circuit, relying on *Yolo County*, has found that futility is not established "until at least one meaningful application has been made." *Herrington*, 834 F.2d at 1495; *Kinzli*, 818 F.2d at 1454-55 (citing *Yolo County*, 106 S. Ct. at 2568 n.8). The plaintiffs in *Herrington* were able to establish the futility of further efforts to seek approval of their development plan. They had submitted an application to Sonoma County for a thirty-two unit subdivision. The plaintiffs' proposal included a tentative map prepared by a civil engineer, a narrative description of the project, and a filing fee. *Herrington*, 834 F.2d at 1491. The application was technically incomplete, however, because it did not contain the requisite environmental impact report, but instead was accompanied only by a series of environmental studies. The plaintiffs demonstrated through uncontroverted testimony that despite this technical insufficiency their plan had in fact been considered and rejected by the County Board of Supervisors. *Id.* at 1496. This testimony also revealed that applications for a variance would have been futile as well because variances were prohibited by law. *Id.* The plaintiffs thus were able to meet the requirements of a final decision without either a technically complete development plan or a rejected application for a variance. The Ninth Circuit, however, "emphasize[d] that mere allegations by a property owner that it has done everything possible to obtain acceptance of a development proposal will not suffice to prove futility." *Id.*

Plaintiffs here do not allege that they have done everything possible, nor can they. Although Alter testified that he believed applications to the County and other entities would be "useless," the law requires a greater legitimate

effort to follow administrative procedures than plaintiffs have made. At the very least, Alter should have sought formal approval of his request for a sewer connection from the Grayslake Board of Trustees at a regular meeting. Mayor Schroeder's informal denial of Alter's request was not unassailable. He refused to approve the sewer connection "at that time." In his letter to the County Board, although the Mayor expressed concerns about the capacity of the Northeast Interceptor, he stated that Grayslake had not taken the position that it would never approve sewer connection to the Unity property. The Village's hesitation to approve Alter's application because of questions about capacity points up the rationale behind the final decision requirement. If the plaintiff had presented a formal application to the Grayslake Board of Trustees with adequate documentation about the density of the proposed development and the anticipated volume of sewage the connection would have to accommodate, then the Village could have made a reasoned decision about the Northeast Interceptor's ability to handle the excess. And if the Village still denied the application, a court would have a basis on which to evaluate the impact and extent of the Village's denial. At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

The plaintiffs' claims are, unfortunately at this late date, not ripe for adjudication. The plaintiffs have not obtained a final decision on their application for a sewer connection; indeed, they have failed even to present a formal application to either the Village of Grayslake or Lake County regarding the Northeast Interceptor. They have failed to seek a connection to the Northwest Interceptor as well. They have not persuaded us that submitting a formal application would be futile—we have

nothing but their assertions to demonstrate futility. This is not enough. Plaintiffs' equal protection and substantive due process claims are not ripe.

As for plaintiffs' claim that they were denied their right to procedural due process, it, too, is premature. We will not evaluate the adequacy of the procedures available to the plaintiffs before they have availed themselves of those procedures. Because neither the Village nor the County has made a final decision regarding a sewer connection for the Unity property, the plaintiffs' procedural due process claim is not ripe. *See Kinzli*, 818 F.2d at 1456.

B. Antitrust Claims

Our discussion of ripeness in connection with the plaintiffs' equal protection and due process claims applies equally to their antitrust claim. *See Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F.2d 361, 368 (3d Cir. 1986) (finding, without discusison, that the district court's ruling on antitrust issues was premature). We believe that this claim also must await a final decision on the plaintiffs' application for a sewer connection.

The plaintiffs in *Suburban Trails*, two affiliated, privately owned bus companies, were denied federal funds by the defendant, the state agency designated to receive and allocate federal grants under the Urban Mass Transportation Act. There was evidence that the defendant denied the plaintiffs' subsidies because the plaintiffs directly competed with the defendants on one route. The plaintiffs charged that the federal legislation preempted the defendant's action, and also argued that the defendant's conduct violated section one of the Sherman Act and denied the plaintiffs due process of law. The Third Circuit, finding that the Urban Mass Transportation Administration (UMTA) retained the right, not yet exercised, to review and perhaps veto the defendant's alloca-

tion plan, held that the plaintiffs' preemption and antitrust claims were not ripe. Administrative proceedings on the plaintiffs' eligibility to receive the federal funds were pending, as was a complaint the plaintiffs had filed against the defendant before UMTA. Even the defendant's decision to deny plaintiffs' subsidy was not yet final.

Plaintiffs here assure us that the do not challenge the facial validity of the agreement between Lake County and Grayslake. Rather they challenge the defendants' use of the powers granted them by the contract. It follows that because the defendants have not yet reached a final decision on the plaintiffs' application for a sewer connection, they have not yet exercised these powers. Plaintiffs' antitrust claim thus is premature.

It is possible that the plaintiffs will prevail on their application for a sewer connection, should they decide to pursue it further. If so, then they will have suffered no injury from the agreement between Grayslake and Lake County. Even if they do not prevail, however, they may not recover against the defendants based on the alleged anticompetitive agreement, because the defendants are immune from antitrust liability under the state action doctrine.

The state action exemption from antitrust liability was established by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), and extended to local government entities acting "pursuant to state policy to displace competition with regulation or monopoly public service." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978). The state's policy must be clearly articulated. *Id.* at 410; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985). In deciding whether a local government's actions are undertaken pursuant to clearly articulated state policy, we "first determine whether any state legislative act(s) authorizes the challenged conduct and then determine whether anticompeti-

tive effects are a foreseeable result of the authorization." *LaSalle Nat. Bank v. DuPage County*, 777 F.2d 377, 381 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 2892 (1986). If the answers to both questions are yes, then we conclude that the state intended the local government's action to be immune from antitrust challenge.

In *LaSalle National Bank*, we analyzed the same statutes the defendants cited to the district court in this case. The plaintiffs in *LaSalle National Bank*, Unity Ventures, William Alter, and the Bank, alleged in their complaint that the defendants had "conspired to unlawfully restrain competition among developers in DuPage County and . . . among local governmental units who seek to annex, to tax, to zone, and to provide utility services to developments." *Id.* at 379. The plaintiffs alleged that the County and the defendant villages reached an agreement whereby each village was given control over access to sewer connections in certain unincorporated areas outside each village, and the County retained control over a portion of the remaining unincorporated areas. The County and each village agreed to a formula for apportioning the limited number of new sewer connections the IEPA would allow. The County was not allocated enough new connections to serve the plaintiffs' proposed development.

We found that "[t]he State of Illinois authorizes counties and municipalities to contract together and combine resources for the provision of sewage treatment." *Id.* at 381 (citing Ill. Ann. Stat. ch. 34, ¶ 3111; Ill. Ann. Stat. ch. 24, ¶ 11-147-4; Ill. Ann. Stat. ch. 111½, ¶ 4046(b)). Moreover, we found express legislative authorization for the IEPA " 'to engage in planning processes and activities and to develop plans in cooperation with units of local government . . . in connection with each such unit.' " *Id.* at 381-82 (quoting Ill. Ann. Stat. ch. 111½, ¶ 1004 (n)). Therefore, we found that the defendants' agreements were authorized by the state legislature. Further,

we viewed anticompetitive results as a foreseeable consequence of the statutory authorization. *Id.* at 382.

> In sum, free competition and competitive pricing are not the policies underlying the Illinois scheme for sewage treatment. Rather the scheme is one in which local governmental units are encouraged to cooperate in providing sewage service to residences within their boundaries for the common good of the communities they serve. These local and regional decisions regarding sewage treatment are guided by political forces, minimal judicial review, *see Krol v. County of Will*, 38 Ill. 2d 587, 590, 233 N.E.2d 417 (1968), and state and national environmental protection laws. Under such a scheme anticompetitive effects are clearly foreseeable and contemplated. We therefore hold that the defendants' agreement allocating sewage treatment capacity was authorized and that the Illinois legislature intended that such cooperative agreements not be the subject of federal antitrust suits.

Id.

The district court found that *LaSalle National Bank* was controlling on this suit. *Unity Ventures*, 631 F. Supp. at 191. It found that the agreement between Lake County and Grayslake was authorized by the same statutes as we relied on in *LaSalle National Bank*. *Unity Ventures*, 631 F. Supp. at 190. And the restraint of competition was a foreseeable result of the authorizing legislation. Were the antitrust claim not premature, we would affirm the district court's judgment that because the state action doctrine applies to the actions of the local governments here, "the jury's verdict and award for the federal antitrust action must be vacated and the action dismissed." *Id.* at 191.

IV. CONCLUSION

In light of the foregoing discussion, we affirm the district court's grant of defendants' motion for judgment notwithstanding the verdict.[3] Costs in this court are waived.

AFFIRMED.

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[3] In light of our holding that plaintiffs' claims were not ripe for adjudication, we do not reach defendants' cross-appeal. We also need not rule on the parties' various motions to strike portions of each others' briefs which do not bear on the ripeness issue, except to deny plaintiffs' request for attorneys' fees.

We acknowledge the four *amicus curiae* briefs filed in support of the defendants-appellees by the State of Illinois, the National Institute of Municipal Law Officers, the National Association of Counties, and the Northeastern Illinois Planning Commission, the National Association of Regional Councils, the American Planning Association, and the Metropolitan Housing and Planning Council.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 2745

UNITY VENTURES, *et al.*,
Plaintiffs,

v.

VILLAGE OF GRAYSLAKE, *et al.*,
Defendants.

TO: The Honorable NICHOLAS J. BUA
United States District Judge

REPORT AND RECOMMENDATION OF MAGISTRATE JOAN HUMPHREY LEFKOW

This action is before the court for a report and recommendation on defendants' Motion to Dismiss. Unity Ventures, LaSalle National Bank and William Alter [1] brought this suit for damages and injunctive relief against Lake County, Illinois, The Village of Grayslake, Illinois, the members of the Lake County Board, individually and as board members, Edwin M. Schroeder, as mayor of Grayslake, and the trustees of the Village of Grayslake. Plaintiffs allege that defendants conspired to prevent the development of Alter's land by a series of wrongful acts,

[1] LaSalle National Bank holds title to the property in question as trustee under a land trust for the benefit of William Alter. Unity Ventures is an Illinois Partnership formed to manage and develop Unity Development. Plaintiffs will be referred to collectively as "Alter".

including denying access to sanitary sewer service, in violation of plaintiffs' rights under the due process and equal protection clauses of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983 (hereafter "§ 1983"). Pendent state law claims based on the Illinois constitution and laws are also asserted.

In reviewing defendants' motion to dismiss, all the well-pleaded allegations of the complaint must be taken as true and the complaint construed in the light most favorable to the plaintiff to determine whether, under any reasonable reading of the pleadings, plaintiff might be entitled to relief. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974). The facts are presented here in the light most favorable to plaintiff.

FACTS

In 1970, Alter acquired an option to purchase 600 acres of land in central Lake County, Illinois, for the purpose of constructing a proposed "Unity" development to consist of shopping centers, multiple- and single-family dwellings and light industrial units. At the time, the property was in an unincorporated area of Lake County, located directly south of the defendant Village of Grayslake and southeast of the then existing boundaries of the Village of Round Lake Park. Broadly speaking, Grayslake was opposed to the growth and expansion of the central Lake County area while Round Lake Park favored growth and development as a means to boost the local economy.

On August 15, 1976, Alter entered into an annexation agreement with Round Lake Park providing for the development of Unity. By the terms of the agreement, Round Lake Park adopted an ordinance annexing the Unity property and in return received contributions of land and money for municipal facilities. On October 21, 1976, Alter exercised his option to purchase and acquired title to the property.

At the time that Alter and Round Lake Park were engaged in plans for annexation and development of Unity, Lake County was preparing to replace the existing sewage systems by constructing a county-wide sanitary sewer system with a network of "interceptors" (large trunk or main sewer lines). Central Lake County was to be served by two principal interceptors. One, known as the Northeast Central Interceptor, was to provide service from Grayslake and communities along its path to a new treatment plant in Gurnee, Illinois. The other, known as the Northwest Central Interceptor, was to provide trunk service to Round Lake Park and communities along its path to a new treatment plant in Fox Lake, Illinois. Under grants approved by the Illinois Environmental Protection Agency, and by the terms of the revenue bond issue and regional plans for the construction of the Interceptor, Unity was in an area designated to be served by the Northeast Interceptor.

On April 20, 1976, Grayslake entered into an agreement with Lake County for sewage disposal whereby the County was to provide service to Grayslake through the Northeast Interceptor. Pursuant to this agreement, Grayslake was granted a "sphere of influence" that included areas of Lake County outside the boundaries of Grayslake, over which Grayslake had the right to approve all connections to Lake County's Northeast Interceptor. The pertinent part of the agreement provided:

> The County shall preserve the function of County interceptors located within the sphere of influence of the Village (as delineated in Exhibit 'A' attached hereto and made a part hereof) by not permitting any direct connection hereto by any person, firm, corporation or municipality unless the Village consents in writing to such direct connection.

Because of Round Lake Park's annexation of Unity, Round Lake Park was concerned about the ability of the

Northwest Interceptor to service the Unity area. In a March, 1977, agreement with the County for sewage disposal service to the Northwest Interceptor, the Village reserved the right to construct and maintain its own sewage treatment plant to service areas not served by the County.[2]

Although annexed to Round Lake Park, Unity is within the "sphere of influence" of Grayslake and, thus, Grayslake had control over any connection of sanitary sewers from Unity to the Northeast Interceptor. Neither plaintiffs nor the officials of Round Lake Park knew of the Sphere of Influence Agreement between Grayslake and Lake County until October 1978.

In August 1978, Alter prepared and submitted to the Lake County Public Works Department two plans for the proposed construction of a connection between Unity and the Northeast Interceptor. The first plan provided for the construction of a connection which would serve only Unity, the cost of which would be borne by Alter. The second plan provided for the construction of a connection which would serve not only Unity but also an area lying between Unity and Grayslake, known as the Heartland development, which Grayslake was purportedly contemplating annexing. Upon receipt of these plans, the Department of Public Works referred both plans to Grays-

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[2] Section 2(c) of the Agreement stated:

> "The Village agrees that during the terms of this Agreement, the Village will not construct or cause or permit or consent to the construction of sewage treatment facilities within the jurisdiction of the Village provided County is able to service and make sewage treatment facilities available. The Village reserves the right, however, in the event that the County is unable to provide sewage treatment facilities to any portions of the Village heretofore annexed or hereinafter annexed to construct, cause, permit or consent to the construction of sewage treatment facilities within said areas not serviced by the County."

lake for its approval under the sphere of influence of agreement.

On October 31, 1978, plaintiffs met with Edwin Schroeder, the Mayor of Grayslake; Martin Galantha, Superintendent of Lake County Public Works; Walter Bengson, Mayor of Round Lake Park; and others, to discuss the proposed sewer connection to the Northeast Interceptor. At this meeting, Alter learned of the sphere of influence agreement. Mayor Schroeder told Alter that Grayslake would not consent to Unity connecting to the Northeast Interceptor. In April and June 1979, Lake County decided to "maintain" the Sphere of Influence Agreement with Grayslake and to take no action on plaintiffs' proposed connection without the express approval of Grayslake.

It now appeared that the County would not serve Unity, so Alter and Round Lake Park prepared plans for construction of a sewage treatment plant for Unity. In November 1979, they obtained a needed variance from the Illinois Pollution Control Board without objection after a recommendation from the Illinois Environmental Protection Agency (IEPA). This order was not appealed to the Illinois Appellate Court and is presumably final. In December 1979, Round Lake Park and a sewer company created for this purpose executed an agreement for construction of the facility.

Meanwhile, a property between Grayslake and Unity, known as Heartland, had been the subject of a proposed development and annexation by Grayslake for several years. In November 1980, because Grayslake had not proceeded with the annexation, the developer of Heartland sought annexation by Round Lake Park. On December 22, 1980 the Grayslake Board of Trustees passed and tendered to Round Lake Park a resolution providing that Grayslake would agree to the sewer connection of Unity to the Northeast Interceptor if Round Lake Park would

agree to engage in the mutual planning of Heartland and to refrain from annexing Heartland without the approval of Grayslake. On January 3, 1981 Round Lake Park declined to approve the Grayslake resolution and on January 14, 1981 they passed a resolution authorizing the annexation of Heartland. Thereupon, the trustees of Grayslake unanimously rescinded their resolution of December 22, 1980 providing for the conditional connection of Unity with the Northeast Interceptor. After Heartland requested annexation to Round Lake Park, Lake County and Grayslake filed with the IEPA allegedly meritless objections to the construction of the sewage treatment plant for Unity.

Plaintiffs allege that the design and effect of Grayslake's and Lake County's actions were to prevent growth and expansion of Round Lake Park and to prohibit the improvement of Alter's real estate. They allege a series of wrongful acts in futherance of these goals:

1. They changed the designation of and including and surrounding Unity from a "New Town" site to open space or farming (par. 19a);

2. They used the condemnation power to acquire parcels of land to be set aside as forest preserves and parks so as to inhibit development (par. 19b);

3. They redrew the boundaries of the Grayslake "sphere of influence" to include the Alter property (par. 19c);

4. Pursuant to the sphere of influence agreement, the County denied Alter a connection to the county-wide interceptor even though Unity had a right to sewer service through Round Lake Park's agreement with the County (par. 19d);

5. The defendants conditioned approval of Alter's connection to the Northeast Interceptor on the Village of Round Lake Park's agreement to forego its

municipal powers of annexation of Heartland (par. 19e); and when Round Lake Park refused to accede to this demand, Grayslake withdrew its offer to approve Alter's connection to the interceptor (par. 51);

6. The defendants then attempted to block Alter's small sewage treatment plant by filing spurious and frivolous objections before various State regulatory agencies (par. 19f).

On these allegations of fact, plaintiffs allege deprivation of their civil rights under section 1983 through violation of substantive due process, procedural due process, and equal protection of the laws. A pendent claim based on the same facts and occurrences as the federal claims asserts numerous state law violations including improper delegation of government authority and breach of statutory duty to provide sewer service. Plaintiffs seek an injunction against defendants' actions impairing development of Unity, and $20,000,000 compensatory damages and punitive damages.

Defendants' motion to dismiss raises the following pending procedural and substantive bases for dismissal: (1) that the action is not ripe for adjudication; (2) that the complaint fails to state a claim upon which relief can be granted; (3) that the claim is barred by the statute of limitations; and (4) that both the individual and municipal defendants are immune from plaintiffs' claim for money damages.

RIPENESS

At the core of the complaint is the allegation that defendants interfered with Alter's right to develop his property by denying him access to sanitary sewer service. Defendants contend that the case is not ripe for adjudication because plaintiffs never formally applied for or requested sanitary sewer service nor did defendants formally deny such service.

Plaintiffs concede that no formal action occurred. They argue that certain conduct by the defendants *in effect* denied plaintiffs the service they sought. Paragraph 19 of the complaint states, "Pursuant to this plan and conspiracy . . . defendants . . . denied plaintiffs a connection to the County's sanitary sewage system." Plaintiffs supplement this conclusory statement with the following factual allegations: (1) that plans were submitted to the Lake County Public Works Department for the proposed connection between the Unity Development and the Northeast Interceptor (par. 38); (2) that the Public Works Department submitted those plans to Grayslake for its approval (par. 39); (3) that plaintiffs were informed by the mayor of Grayslake that Grayslake was exercising its authority under the "sphere of influence" agreement, and that it would not consent to a sewer connection between Unity and the Northeast Interceptor (par. 40); and (4) that the Public Service Committee of the County Board, because of the sphere of influence agreement, declined action on plaintiffs' proposed sewer connection (par. 41). On this record, there is no requirement of a particular formalized application process.

That Alter submitted proposals to the County, and that the County referred them to Grayslake and thereafter declined action based on the reported veto by Grayslake, support the conclusion that a request had been made and denied and that any more formal application would have been futile.

Next, defendants argue that the case is not ripe because the plaintiffs failed to undertake the necessary conditions precedent imposed by federal and state law for obtaining approval of such sewer service before applying to the County. According to defendants, the sanitary sewer connection at issue was not consistent with the area-wide Water Quality Management Plan adopted by the IEPA. In order to obtain a connection, Alter would have had to apply to the IEPA for an amendment of the

plan. Once amended, Alter could seek approval of the connection. Defendants concede that Lake County, as owner of the sanitary sewer system in question, would have to join in the request for approval of the connection before the Illinois Environmental Protection Agency would approve it. Defendants' reply memorandum at 6. Thus, once it became known to Alter that the County would not approve the connection, it would have been futile for him to seek amendment of the Water Quality Management Plan.

In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-49 (1967), the Supreme Court summarized the "ripeness" doctrine, stating, "[W]ithout undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects left [*sic*—felt] in a concrete way by the challenging parties." The Court's duty is to evaluate both the fitness of the issues for judicial determination and the hardship to the parties of withholding court consideration. *Id.* at 149.

The legal issues here do not turn on acts of the IEPA. Even a decision favorable to Alter there would not vindicate his claims here. Alter claims that Grayslake and the County violated his civil rights. The acts complained of have already occurred, and future events would not add significantly to the operative facts necessary for adjudication of the dispute. *Chesapeake Bay Village, Inc.* v. *Costle*, 502 F. Supp. 213, 219 (D. Md. 1980).

In terms of the impact on plaintiff, Alter alleges that he is unable to proceed with development of his property as a result of defendants' conduct. To require him to pursue formal acts which in all reasonable probability

would not result in a change of his situation would be unjust.[3] Therefore, I conclude that the issues are ripe for adjudication.

SUFFICIENCY OF THE CLAIMS

The establishment and application of Grayslake's veto power over the sewer connection forms the basis of plaintiffs' substantive and procedural due process and equal protection claims under § 1983 and the Fourteenth Amendment. Because the procedural due process issue requires a determination whether plaintiffs' allegations meet the strict requirements of a protected "property right", that issue will be addressed first.

Procedural Due Process

In Count II, Alter alleges that the establishment and application of Grayslake's veto power deprived plaintiffs of their right to procedural due process in violation of the Fourteenth Amendment and § 1983. He alleges that the veto power deprived plaintiffs of a hearing before an impartial tribunal; it established no standards for approval or disapproval of connections to the Northeast Interceptor; and it deprived him of the right to appeal an adverse decision. Defendants argue that plaintiffs have not alleged a property interest entitled to constitutional protection.

To make out a claim for denial of procedural due process one must assert that he unjustly was deprived of a constitutionally protected liberty or property interest.

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[3] The parties also rely on *Village of Arlington Heights* v. *Metropolitan Housing & Development Corp.*, 429 U.S. 252, 261-62, in which the need to obtain approval of other contingent plans was asserted as a basis for lack of standing of plaintiffs. There the question was whether plaintiffs had sufficient stake in the controversy at the time. If the issue here is viewed as one of standing, it also points to a conclusion in favor of plaintiffs.

Board of Regents v. *Roth*, 408 U.S. 564 (1972). Plaintiffs' complaint asserts a number of property interests:

> "The right of ALTER and UNITY VENTURES to connect with the existing publicly funded Northeast Interceptor and to thereby receive sewage services, and the right of Alter to be able to develop his property and to put it to its highest and best use, are property rights protected and secured by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States." Complaint, Count I, par. 63.

In their brief, plaintiffs cite additional sources from which their property right is derived: First, Alter claims that his right to obtain sewer service is secured by the Agreement for Sewage Disposal entered into between Round Lake Park and the County, which provided that the County was to provide sanitary sewage services to Round Lake Park or, alternatively, that Round Lake Park could construct its own sewage plant to service areas which could not be served by the County. Second, Alter also argues that his federally protected property interest derives from his rights under state law. Third, Alter contends that his right to proceed with Unity is established under Illinois law because of the substantial monies he has invested and that this creates a federal property right.

In the due process analysis articulated in *Roth*, property interests are seen as emanating not only from the Constitution but also from state or federal statutory schemes and customs which create legitimate claims of entitlement to the benefits which they confer.[4] 408 U.S. at 577. A property interest may arise as to a desire

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[4] *Roth* held that an untenured college teacher who had no specific claim to continued employment either by his contract or by local school custom had no protected property interest that would entitle him to a hearing prior to termination of employment.

for a benefit not yet enjoyed. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979).

Subjecting Alter's complaint to the property interest analysis, I find no federally protected right which would entitle Alter to sewer service. As stated in *Chesapeake Bay Village, Inc.* v. *Costle*, 502 F. Supp. 213, 226 (D. Md. 1980), a case dealing with similar issues, "[P]laintiff has cited neither statutory nor judicial authority that would indicate it has a recognized property interest in the approval of a specific sewage treatment facility, or even such an interest in new sewage facilities in general." See also *United Land Corporation of America* v. *Clarke*, 613 F.2d 497, 501 (4th Cir. 1980).

Illinois grants power to the county boards to control and regulate the disposal of sewage. Water Supply, Drainage and Flood Control Act, Ill. Rev. Stat. ch. 34 §§ 3101 et seq., § 3111. Under §-3102, the County Board may create a Department of Public Works with authority "to exercise complete supervision" over the projects authorized by the Act. Lake County has done this. (Complaint, par. 38). Under § 3105, the County's powers shall be exercised only in areas which do not have available similar services provided by another governmental unit unless requested by such governmental unit to provide the service. Fairly read, the Act imposes an affirmative duty on the County to exercise authority in areas without available services. But I find no duty to provide sewer service to unsewered land.

Nor can the argument that plaintiffs' have a property interest in obtaining sewer service under the Agreement between Round Lake Park and the County be sustained. The Agreement states that if the County cannot provide service, Round Lake Park has a right to construct a sewage treatment plant to serve annexed areas such as Unity. This Agreement does not give persons in Alter's situation any *rights* to have the plant built. But even

conceding for discussion that a property interest of constitutional proportion exists, I can find no process due, at least from these defendants. Certainly their objection to construction of the plant before the IEPA (The record is not clear whether this was before the Northeastern Illinois Planning Commission or the IEPA)—even if frivolous—would not be a deprivation of due process.

There is merit, however, to plaintiffs' contention that they have a protected property interest in developing their property as they wish to develop it.[5] The Supreme Court recognized many years ago that "[t]he right of the [property owner] to devote its land to any legitimate use is properly within the protection of the Constitution." *Washington ex rel. Seattle Title Trust Co.* v. *Roberts*, 278 U.S. 116, 121 (1928). Obviously, however, plaintiffs have no right to develop the land to any use they desire; they are only entitled to fundamentally fair procedures in a governmental decision to abridge that property interest. Here, plaintiffs allegedly are unable to put their land to a legitimate use because defendants have blocked access to a sewer connection. Thus, they are entitled to an examination of the process which produced that result.

If, under the Water Supply, Drainage and Flood Control Act discussed above, the County is to exercise authority in areas without available services, plaintiffs have a claim to have the County make the decision pertaining to whether a sewage treatment connection will be made, in a reasonable manner and subject to its own ordinances, rules and regulations. A delegation of an unfettered veto power to another governmental unit which is not governed by the same laws or responsive to the same body politic deprives them of the procedures that would allegedly be attendant to a decision by the County:

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[5] The scope of this discussion includes the third argument above, that plaintiffs' substantial investment in reliance on legality of the project under local ordinances creates a federal property interest.

rights to a meaningful hearing, to a decision according to established standards and to appeal an adverse decision.[6]

In *Seattle Trust*, the Court invalidated a similar veto power given to property owners surrounding the property at issue. The Court rejected this delegation as "uncontrolled by any standard or rule prescribed by legislative action . . ., without provision for review." 278 U.S. at 122. The Court also noted that the decision makers "are not bound by any official duty but are free to withhold consent for selfish reasons. . . ." *Id.* While the Village defendants may be bound by official duty, they have no official or representative duty outside the Village limits, where Unity is.

Therefore, it is recommended that the Court find that plaintiffs have stated a claim under the (procedural) due process clause. They should be allowed to prove that the Sphere of Influence Agreement was the sole reason for the County's action and that they were consequntly deprived of procedures they otherwise would have received. Because of the conclusions as to governmental immunity below, the defendants would only be subject to injunctive or declaratory relief.

Substantive Due Process/Equal Protection

The substantive due process and equal protection claims focus on the application of the veto power under the sphere of influence agreement. Under the due process analysis, this is alleged to be an arbitrary and capricious exercise of power; under equal protection analysis it subjects plaintiffs to less favorable treatment than property owners outside the sphere of influence, without a rational relation to a legitimate governmental interest. Because the two clauses are treated essentially the same

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[6] Plaintiffs, however, do not cite the source of these rights in County ordinances or state law.

where no "fundamental interest" is at stake, they may be joined for analysis. See *Chesapeake Bay*, 502 F. Supp. at 226. Under equal protection, the Supreme Court standard is to allow legislative enactments to stand "unless the varying treatment of different groups of persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97 (1979). Unlike equal protection, the focus of due process analysis is not whether the classification of similarly situated persons is irrational but whether it was irrational for the governmental units to have passed the law at all and to have applied it to plaintiffs. *Rogin* v. *Bensalem Township*, 616 F.2d 680, 689 (3rd Cir. 1980).

The complaint alleges that the sphere of influence and veto power were created to inhibit growth in the central Lake County area and specifically to block Alter. I find no authority for a conclusion that control of growth may not be a legitimate concern of local government. Certainly population affects the amount of waste disposal necessary and is within the realm of legitimate concern of the County defendants. The governmental activity here, similar to the zoning area, entails the accommodation of competing interests through representative decision-making, and by its nature some are burdened more than others by the decisions. Thus, plaintiffs bear a heavy burden of persuasion.

At the time the sphere of influence was created, Round Lake Park had not annexed Unity. In reaching the accord, undoubtedly competing interests were being accommodated. I cannot conclude that it was irrational to create a sphere of influence in which the County agreed to give some deference to Grayslake's concerns about growth. On the other hand, placing a veto power in the Village over property outside the Village limits, which was more than advisory but by its terms absolute, does go beyond

a rational approach to a legitimate goal. While it may have been rational to treat those within the sphere of influence differently from those without, it was "irrational" for the County to abdicate its responsibility to supervise the areas of the county without service. This produced the anomalous situation, after Round Lake Park annexed an area within the sphere of influence, in which Grayslake had control over areas within Round Lake Park's jurisdiction. Thus, by more or less the same route as led to the conclusion as to procedural due process, I conclude that plaintiffs have stated a claim for violation of substantive due process. Again, this would subject defendants to injunctive but not monetary relief.

In addition, under the rational basis test, defendants may not exercise their authority in an arbitrary, capricious or unreasonable manner. If plaintiffs can establish that defendants took actions such as removing the New Town designation, condemning surrounding land for parks, even creating the sphere of influence itself, as a means to block Alter for reasons not based on legitimate concerns for the community, or that defendants treated Alter differently from others in a similar situation (though this is not alleged), this would indeed be a singling out that would not pass equal protection and due process standards. See *Chesapeake Bay*, 502 U.S. at 226; *Sternaman* v. *County of McHenry*, 454 F. Supp. 240 (N.D. Ill. 1978).[8] This claim, if established, would give rise to damages. Within narrow limits, the complaint does state a cognizable claim under substantive due process and should not be dismissed. As to equal protection, absent allegations of disparate treatment, the complaint fails to state a claim upon which relief can be granted.

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[8] But see *Flower Cab Company* v. *Petitte*, 685 F.2d 192, 194 (7th Cir. 1982), casting doubt on the due process foundation of *Sternaman*.

PENDENT STATE LAW CLAIMS

Defendants do not challenge the sufficiency of plaintiffs' state law claims, nor do they argue that the claims do not meet the test for pendent jurisdiction. Rather, they state that the state claims must be dismissed in the absence of valid federal claims. In light of the disposition of the federal claims above, the pendent claims should also withstand the motion to dismiss.

STATUTE OF LIMITATIONS

The Sphere of Influence Agreement between Lake County and Grayslake was executed by the parties on April 20, 1976, and the instant action filed on May 15, 1981. Defendants contend that since the proximate cause of plaintiffs' alleged injury is the adoption of the Agreement, and the applicable statute of limitations is five years, plaintiffs' action is barred. Defendants' argument is without merit.

Illinois law is clear that the statute of limitations is measred from the date plaintiffs' cause of action accrued. *Ozark Airlines, Inc.* v. *Fairchild-Hiller Corp.*, 71 Ill. App. 3d 637, 309 N.E.2d 444, 28 Ill. Dec. 277 (1979). Plaintiffs would have had no basis for an action until they had been denied sewer service through application of the Agreement. The possibility of Alter's obtaining permission to connect to the interceptor was finally foreclosed when Grayslake rescinded conditional approval of the connection on December 22, 1980. Clearly, plaintiffs' action falls within the five-year statute of limitations and it should not be dismissed on that ground.

GOVERNMENTAL IMMUNITY

Defendants' final ground for dismissal is based on doctrines of immunity. Defendants claim (1) that municipal corporations are absolutely immune from damages resulting from legislative acts; (2) the individual defend-

ants enjoy absolute immunity for acts taken in a legislative capacity; and (3) defendants are immune from punitive damages under § 1983.

Under *Owen* v. *City of Independence*, 445 U.S. 662 (1980), a municipal corporation may be held liable under § 1983 for the " 'execution of a governmental policy of custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy' ", 445 U.S. at 657-58, without regard to the good faith of the officials involved.

Owen involved the firing of a police chief by the City Manager after a Council meeting. The Council, upon hearing a report of the police chief's alleged misconduct from one of its members, passed a resolution directing the City Manager to " 'take all direct and appropriate action' against those persons involved. . . ." *Id.* at 629. The focus of the suit was that the discharge was caused by the official conduct of the City Council. The Court held that although the individual defendants as officials may assert the defense of good faith, the City may not assert the good faith of its officials in its defense. The effect of this case appears to be an imposition of "strict" liability against the municipality if any official acts result in deprivation of civil rights.

It is important, however, that the passage of the resolution in *Owen* was directed at the plaintiff rather than a large number of persons as is typical "legislative" action. Proving that a more general piece of legislation results in a civil rights violation as to an individual would be much more difficult. Under the legislative-administrative distinction discussed below with respect to the individual defendants, this was an action by a legislative body but of an administrative character. See *Rogin* v. *Bensalem Township*, 616 F.2d 680, 693, n. 60 (3rd Cir. 1980). In light of the clear controversy among members of the Supreme Court on the immunity of gov-

ernmental units and officials under § 1983,[9] I read *Owen* as applying to acts of local legislative bodies taken when applying a rule or ordinance to an individual and not in enacting legislation of broad applicability.

Here, then, if plaintiffs can establish that the decision to veto was made arbitrarily or with the purpose of singling Alter out for unfavorable treatment as discussed above, liability would follow against the Village, without regard to the good faith of the members of the Village Board or the Mayor. Within these confines, I find no basis for absolute immunity for the municipality for civil rights violation.

The individual defendants next assert immunity from suit for actions undertaken in their legislative capacities. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951), held that individual state legislators acting in their legislative capacities enjoy absolute immunity from suits under § 1983. In *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979), that immunity was extended to regional planning commissioners. Although specifically sidestepped in *Lake Country Estates*, 440 U.S. at 404, n. 26, an extension of absolute immunity under § 1983 to local legislators has resulted from this decision. See, e.g., *Hernandez* v. *City of Lafayette*, 643 F.2d 1188, 1192 (5th Cir. 1981), *cert. denied*, —— U.S. ——, 50 U.S.L.W. 3566 (Jan. 19, 1982); *Rheuark* v. *Shaw*, 628 F.2d 297 (4th Cir. 1980); *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607, 611-14 (9th Cir. 1980); *Sawmill Products* v. *Town of Cicero*, Memorandum Opinion of Judge Hart, 79 C 496 (N.D. Ill., February 4, 1982).

However, only qualified immunity protects officials who perform administrative acts. Allegations of bad faith as would defeat a claim of immunity need not be included

[9] Compare *Lake Country Estates* v. *Tahoe Planning Agency*, 440 U.S. 391 (1979) to *Owen*, with special attention to dissenting opinions.

in a complaint; rather, defendant has the burden of pleading good faith as an affirmative defense. *Gomez* v. *Toledo*, 446 U.S. 635 (1980). Therefore, in order for defendants to prevail on their motion, it must appear from the complaint that the critical acts are legislative in character. *Gorman Towers, Inc.* v. *Bogoslavsky*, 626 F.2d 607 (8th Cir. 1980).

Legislative acts are said to be broad, general decisions establishing guidelines by which future conduct of a large group of persons will be judged, while executive or administrative acts generally consist of the application of legislation to specific situations. *See, Supreme Court of Virginia* v. *Consumers Union*, 446 U.S. 179 (1980); *Rogin* v. *Bensalem Township*, 616 F.2d 680, 693, n. 60 (3rd Cir. 1980); *Three Rivers Cablevision* v. *City of Pittsburgh*, 502 F. Supp. 1118, 1136 (W.D. Pa. 1980).

In the instant case, the establishment of the sphere of influence was clearly legislative and the individual defendants are absolutely immune from liability for any damages resulting from its creation. Grayslake's application of the Agreement in denying Alter approval for the connection was administrative in nature. Likewise, the County officials, in deciding to take no further action on Alter's application following Grayslake's veto, were acting in their administrative capacities. Furthermore, as plaintiffs urge, a finding of qualified rather than absolute immunity allows the action to proceed to trial in order to establish the circumstances behind the motivation for the officials' conduct.

It is recommended that the court deny the individual defendants' motion on the ground of absolute legislative immunity.

Punitive Damages

Finally, defendants move this court to dismiss the complaint to the extent that it seeks an award of puni-

tive damages. Punitive damages may be awarded under § 1983 against the individual defendants. *Spence* v. *Staras*, 507 F.2d 554 (7th Cir. 1974); *Carey* v. *Piphus*, 435 U.S. 255, 257, n. 11 (1978). Plaintiffs have cited no authority authorizing the award of such damages against the governmental units. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981), held that "a municipality is immune from punitive damages under 42 U.S.C. § 1983." Therefore, that portion of the complaint which seeks an award of punitive damages from the governmental bodies should be dismissed.

SUMMARY

I conclude that this complaint is ripe for adjudication, and that it states certain narrow claims upon which relief can be granted:

(1) That the County, in giving Grayslake a veto power over the sewer connection, deprived plaintiffs of procedures to which they were entitled under the due process clause and for which injunctive and declaratory relief are appropriate.

(2) That the County, in giving Grayslake a veto power over the sewer connection respecting property outside the Village limits and within the County's area of responsibility, was an irrational act, violative of substantive due process, for which injunctive and declaratory relief are appropriate.

(3) That defendants, in singling out plaintiffs for arbitrary treatment without relation to legitimate governmental concerns, have violated substantive due process, for which injunctive, declaratory and monetary relief are appropriate.

In all other respects, I conclude the complaint fails to state a claim.

I further conclude that the governmental units are not immune from liability; that the individual defendants must plead a good faith defense to establish qualified immunity, and that the statute of limitations does not bar this action. Finally, I conclude that the claim for punitive damages against the governmental units should be dismissed, and that the court should retain jurisdiction over the pendent state law claims.

Respectfully submitted,

/s/ Joan Humphrey Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate

DATE: February 9, 1983

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable BUA

81 C 2745

UNITY VENTURES

v.

VILLAGE OF GRAYSLAKE

February 23, 1983

Court adopts the report and recommendations of the Magistrate. Defendants' motion to dismiss is granted in part and denied in part.

Status hearing set for April 5, 1983 at 9:30 AM.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable BUA

81 C 2745

UNITY VENTURES

v.

VILLAGE OF GRAYSLAKE

March 15, 1983

Plaintiffs' and defendants' objections to Magistrate's report and recommendations of February 9, 1983, taken as motions for reconsideration of this court's order of February 23, 1983 adopting said report and recommendations, DENIED.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 81 C 2745

UNITY VENTURES, *et al.*,
Plaintiffs,

v.

COUNTY OF LAKE, *et al.*,
Defendants.

March 19, 1986

James P. Chapman, Alan Mills, Robert J. Zaideman, James P. Chapman & Associates, Ltd., Chicago, Ill., for plaintiffs.

Fred L. Foreman, State's Atty. of Lake County by Clifford L. Weaver, Gerald P. Callaghan, Waukegan, Ill., for defendants Lake County, George Bell, and Norman Geary.

Clifford L. Weaver, William Freivogel, Robert C. Newman, Kathryn A. Knue, Diana C. White, Burke, Bosselman, Freivogel, Weaver, Glaves & Ryan, Chicago, Ill., for all defendants.

Phillip Areeda, Cambridge, Mass., of counsel, to all defendants as to Antitrust Issues only.

MEMORANDUM ORDER

BUA, District Judge.

Before the Court is the defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. For the reasons stated herein, the motion for a judgment n.o.v. is granted, and the motion for a new trial is denied.

I. INTRODUCTION

Unity Ventures, LaSalle National Bank, and William Alter brought this suit for damages and injunctive relief against Lake County, Illinois, The Village of Grayslake, Illinois, the members of the Lake County Board, individually and as board members, Edwin M. Schroeder, as mayor of Grayslake, and the trustees of the Village of Grayslake. Plaintiffs alleged that defendants conspired to prevent the development of Alter's land by a series of wrongful acts, including denying access to sanitary sewer service, in violation of plaintiffs' rights under the due process and equal protection clauses of the Fourteenth Amendment and the Civil Rights Act of 1871, 42 U.S.C. § 1983.

All claims, except for those based on procedural due process, were tried to a jury. On January 12, 1984, the jury returned a verdict in favor of the plaintiffs and against the defendants for $9,500,000 on the antitrust claim and on the civil rights claim. The verdict on the antitrust claim was trebled and the Court entered judgment in favor of the plaintiffs in the amount of $28,500,000. Thereafter, the defendants filed a timely motion for j.n.o.v. or, in the alternative, for a new trial.

II. FACTS

In 1972, plaintiffs obtained an option to purchase approximately 585 acres of farmland ("the Unity property") in a then unincorporated portion of Lake County.

The Unity property is located directly south of Grayslake and southeast of the then existing boundaries of Round Lake Park. On August 15, 1976, Alter entered into an annexation agreement with Round Lake Park providing for the development of Unity. By the terms of the agreement, Round Lake Park adopted an ordinance annexing the Unity property and in return received contributions of land and money for municipal facilities. On October 21, 1976, Alter exercised his option to purchase and acquired title to the property.

At the time that Alter and Round Lake Park were engaged in plans for annexation and development of Unity, Lake County was preparing to replace the existing sewage systems by constructing a countywide sanitary sewer system with a network of "interceptors" (large trunk or main sewer lines). Central Lake County was to be served by two principal interceptors. One, known as the Northeast Central Interceptor, was to provide service from Grayslake and communities along its path to a new treatment plant in Gurnee, Illinois. The other, known as the Northwest Central Interceptor, was to provide trunk service to Round Lake Park and communities along its path to a new treatment plant in Fox Lake, Illinois. Under grants approved by the Illinois Environmental Protection Agency (IEPA), and by the terms of the revenue bond issue and regional plans for the construction of the Interceptor, Unity was in an area designated to be served by the Northeast Interceptor.

On April 20, 1976, Grayslake entered into an agreement with Lake County for sewage disposal whereby the County was to provide service to Grayslake through the Northeast Interceptor. Pursuant to this agreement, Grayslake was granted a "sphere of influence" that included areas of Lake County outside the boundaries of Grayslake, over which Grayslake had the right to approve all connections to Lake County's Northeast Interceptor. The pertinent part of the agreement provided:

> The County shall preserve the function of County interceptors located within the sphere of influence of the Village (as delineated in Exhibit "A" attached hereto and made a part hereof) by not permitting any direct connection hereto by any person, firm, corporation or municipality unless the Village consents in writing to such direct connection.

(Pl.Ex. 30, p. 8).

The 1976 agreement contained two changes over the previous sewage disposal agreement executed in 1973 between Grayslake and the County: the addition of the Unity property and Heartland property to Grayslake's sphere of influence and the addition of the word "municipality" in the paragraph cited above. These changes brought the Unity property and development within Grayslake's sphere of influence and, thus, Grayslake had control over any connection of sanitary sewer service from Unity to the Northeast Interceptor. Neither plaintiffs nor the officials of Round Lake Park knew of the sphere of influence agreement between Grayslake and Lake County until October 1978.

In August 1978, Alter prepared and submitted to the Lake County Public Works Department two plans for the proposed construction of a connection between Unity and the Northeast Interceptor. The first plan provided for the construction of a connection which would serve only Unity, the cost of which would be borne by Alter. The second plan provided for the construction of a connection which would serve not only Unity but also an area lying between Unity and Grayslake, known as the Heartland development, which Grayslake was contemplating annexing.

On August 28, 1978, these plans were submitted to Martin Galantha, Director of the Lake County Public Works Department. In a letter dated September 25, 1978 to Mayor Schroeder, Galantha described the plans:

> [A]lthough most of Round Lake Park is to be provided sewer service as part of the Northwest regional system, the Unity Venture development lies within the Des Plaines River basin and therefore, should be tributory to the County's Northeast Central interceptor system.

(Pl.Ex. 50, p. 1.) Galantha approved of the plans and sent them to Mayor Schroeder for Grayslake's approval pursuant to the sphere of influence agreement.

On October 31, 1978, plaintiffs met with Mayor Schroeder, Galantha, Walter Bengson, Mayor of Round Lake Park, and others to discuss the proposed sewer connection to the Northeast Interceptor. At this meeting, Alter learned of the sphere of influence agreement. Mayor Schroeder told Alter that Grayslake would not consent to Unity connecting to the Northeast Interceptor at that time.

On March 16, 1979, the Public Service Committee of the Lake County Board obtained a legal opinion from the law firm of Chapman & Cutler about the propriety of Grayslake's veto power under the sphere of influence agreement. (Pl.Exs. 147 and 148). In particular, Chapman & Cutler advised the Board:

> Due process of law requires that intelligible standards be provided to guide the recipient of a delegation of power. . . . However, the Agreement vests the Village with entirely arbitrary authority and therefore, could be held void in whole or in part. . . .

(Pl.Ex. 113, p. 2).

Chapman & Cutler also suggested that Grayslake's veto might violate the antitrust laws insofar as the veto power was not per se immune under the state action doctrine as applied to the antitrust laws. Defendants Geary, Schroeder and Bell objected to the Public Service Committee after it asked the State's Attorney what it should

do about the veto and the sphere of influence agreement. (Pl.Exs. 112, 111 and 149, respectively.) Finally, the Public Service Committee agreed to drop any further inquiry into the legality of Grayslake's veto and directed that "the County should take whatever action may be required to support the validity of this contract." (Pl.Ex. 130.)

Since it appeared that the County would not provide sewer service to the Unity property via the Northeast Central Interceptor, plaintiffs and Round Lake Park prepared plans for construction of a sewage treatment plant for Unity. In November 1979, they obtained a needed variance from the Illinois Pollution Control Board without objection after a recommendation from the IEPA. This order was not appealed to the Illinois Appellate Court. In December 1979, Round Lake Park and a sewer company created for this purpose executed an agreement for construction of the facility.

Meanwhile, the Heartland property had been the subject of a proposed development and annexation by Grayslake for several years. In November 1980, because Grayslake had not proceeded with the annexation, the developer of Heartland sought annexation by Round Lake Park. On December 22, 1980, the Grayslake Board of Trustees passed and tendered to Round Lake Park a resolution providing that Grayslake would agree to the sewer connection of Unity to the Northeast Interceptor if Round Lake Park would agree to engage in the mutual planning of Heartland and to refrain from annexing Heartland without the approval of Grayslake. On January 3, 1981, Round Lake Park rejected the Grayslake resolution and on January 14, it passed a resolution authorizing the annexation of Heartland. Thereupon, the trustees of Grayslake unanimously rescinded their resolution which provided for the conditional connection of Unity with the Northeast Interceptor.

After Heartland requested annexation to Round Lake Park, Lake County and Grayslake filed with the IEPA

objections to the construction of the sewage treatment plant for Unity. On June 3, 1981, the defendants filed an action in the Circuit Court of Lake County challenging the validity of Heartland's zoning and annexation by Round Lake Park. On May 15, 1981, this action was filed. On January 22, 1982, this Court denied defendants' motion to have it abstain from ruling in this action. On March 22, 1982, defendants amended their action in the Circuit Court of Lake County to add allegations that Round Lake Park's zoning of plaintiffs' property was invalid.

III. DISCUSSION

The defendants in this case are requesting this Court to grant their motion for judgment notwithstanding the verdict based on their allegation that the jury's verdict was not supported by substantial evidence. The Seventh Circuit recently articulated the standard for determining whether a judgment n.o.v. should be granted: "whether the evidence presented, combined with all reasonable inferences permissibly drawn therefrom, is sufficient to support the verdict when viewed in a light most favorable to the party against whom the motion is directed." *Tice v. Lampert Yards, Inc.*, 761 F.2d 1210, 1213 (7th Cir. 1985). In reviewing the record, this Court must resolve all conflicts in the evidence in favor of the plaintiff, and may not judge the credibility of the witnesses. *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir.1984).

A. ANTITRUST IMMUNITY

1. *The Local Government Antitrust Act of 1984*

The Local Government Antitrust Act of 1984, P.L. No. 98-544, 130 *Cong. Rec.* H11850-51 (daily ed. Oct. 10, 1984) ("the Act") prohibits damages from being entered against local governments for violations of the Clayton Act (15 U.S.C. §§ 15, 15a or 15c). The Act, which be-

came effective September 10, 1984, is not retroactive unless specific conditions are met.

Defendants claim that this case meets the conditions necessary to trigger retroactive application of the Act, even though a jury verdict had been rendered prior to the passage of the Act. The plaintiffs contend that the Act does not apply retroactively to this case; an argument which, if successful, might enable the $28.5 million verdict to stand.

(a) *Language of the Act*

The language of the Act and the Conference Report is plain. Section 3(a) of the Act creates an immunity from damages:

> No damages, interest on damages, costs, or attorneys' fees may be recovered under Section 4, 4A, or 4C of the Clayton Act (15 U.S.C. §§ 15, 15a, 15c) from any local government, or official or employee thereof acting in an official capacity.

But under Section 3(b), this immunity is not retroactive: "Subsection (a) shall not apply to cases commenced before the effective date of this Act"—unless stringent conditions are met:

> [U]nless the defendant establishes and the court determines, in light of all the circumstances, including the stage of litigation and the availability of alternative relief under the Clayton Act, that it would be inequitable not to apply this subsection to a pending case. In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be *prima facie* evidence that [the immunity] shall not apply.

The October 10, 1984 Conference Report explains this language as follows:

> The application to pending cases of . . . section 3 will be based upon a case-by-case determination by the district court. The local government has the burden of proof to establish to the court's satisfaction that it would be inequitable not to apply [immunity] to the pending case. The court is to consider all relevant circumstances. The statute mentions two of the factors that the court should consider—stage of the litigation and the availability of alternative relief under the Clayton Act. Where a pending case is in an early stage of litigation and where injunctive relief can remedy the problem, the defendant local government may be able more easily to sustain its burden. Where a case is in more advanced stages of litigation or where injunctive relief is unavailable or incomplete, the burden would become more difficult. If a case has progressed to or beyond a jury verdict or district court judgment, *a local government defendant would need compelling equities on its side* to justify the application of [immunity] to the pending case. (Emphasis added).

(b) *Application of the Act*

In this case, which has progressed beyond a jury verdict, Congress has placed the burden of proof on the defendants to show "compelling equities." The defendants must rebut the *prima facie* evidence that the Act shall not apply. They have failed to meet this burden.

Defendants cite four cases which discuss the retroactive application of the Act. *TCI Cablevision, Inc. v. Jefferson City*, 604 F.Supp. 845 (W.D.Mo.1984); *Jefferson Disposal Co. v. Parish of Jefferson*, 603 F.Supp. 1125 (E.D.La.1985); *Bates v. City of Kansas City*, No. 83-1331—CV-W-3, slip op. (W.D.Mo., Feb. 7, 1985); *Town of St. Cloud v. City of St. Cloud*, No. 6-84-164, slip op. (D.Minn., Dec. 16, 1984). However, none of these cases considers the application of the Act to a case in which a

jury verdict had already been rendered. The defendants, in fact, present no evidence to rebut the statutorily-created *prima facie* evidence of a jury verdict. They cite no persuasive authority on which this Court should deviate from a straight-forward interpretation of the language of the Act. Under that language, this case clearly does not necessitate the retroactive application of the Act.

The jury verdict for this case was rendered in January 1984, long before this Act was passed. The verdict will stand because the defendants have failed to meet their burden of proving that compelling equities necessitate the retroactive application of the Act.

Since the retroactive application of the Act is being decided on the basis of the stage of litigation, it is not necessary to consider whether or not alternative relief is available under the Clayton Act.

2. *State Action Doctrine of Immunity*

Defendants allege that the plaintiffs have failed to state a claim on the ground that the defendants' governmental activities were immune from antitrust challenge under the state action doctrine. Accordingly, defendants assert that they are entitled to judgment n.o.v. or, in the alternative, a new trial.

Exemption for anticompetitive actions by state governments was established by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Supreme Court in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 98 S.Ct. 1123, 1137, 55 L.Ed.2d 364 (1978) extended the *Parker* exemption to local government units acting "pursuant to state policy to displace competition with regulation or monopoly public service." Before it will be exempt from antitrust challenge, the activity must be supported by state policy which is "clearly articulated and affirma-

tively expressed." *City of Lafayette*, 435 U.S. at 410, 98 S.Ct. at 1135; *Community Communications Company v. City of Boulder*, 455 U.S. 40, 51, 102 S.Ct. 835, 840, 70 L.Ed.2d 810 (1982).

Most recently, the Supreme Court has upheld the "clearly articulated state policy" test in *Town of Hallie v. City of Eau Claire*, —— U.S. ——, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). This decision fully considers how clearly articulated a state policy must be in order for a municipality to establish that its anticompetitive conduct constitutes state action. *Id.* 105 S.Ct. at 1717. Furthermore, *Town of Hallie* provides this Court with a standard for analyzing the Illinois statutes at issue in the present case.

In *Town of Hallie*, four towns surrounding the City of Eau Claire alleged that the City conditioned the provision of sewage treatment, over which it had a monopoly, upon a property owner's agreement to annex his property to the City. The towns alleged that this condition constituted a tying arrangement in violation of the Sherman Act. The Supreme Court affirmed the dismissal of the town's claim, holding that the City of Eau Claire's actions reflected a "clearly articulated and affirmatively expressed" state policy to permit municipalities to condition the provision of sewage treatment upon an agreement to annex.

Town of Hallie established that, to pass the "clear articulation" test, a state statute must "clearly contemplate that a city may engage in anticompetitive conduct." *Id.* at 1718. The legislature, however, need not expressly have stated in either a statute or its legislative history that it intended for the action to have anticompetitive effects. *Id.* at 1719.

The Wisconsin statutes in *Hallie* provided that a city may: 1) define the area to be served by its sewer system [Wis.Stat. § 62.18(1)(1982)]; 2) fix the limits of

such service in unincorporated areas [Wis.Stat. Ann. § 66.069(2c) (Supp.1984); and 3) refuse to serve an area which refuses to annex to the city [Wis.Stat.Ann. § 144.-07(1m) (Supp.1984)]. Thus, the Wisconsin statutes specifically authorized the City of Eau Claire to use its monopoly power over sewage treatment to force property owners to annex to the City as a condition of obtaining sewage service. *Town of Hallie*, 105 S.Ct. at 1718.

In analyzing the plain meaning of the statutes, the Supreme Court held that "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas." *Id.*

Recently, the Seventh Circuit Court of Appeals addressed the issue of state action immunity in a case involving similar, if not identical, facts to the present case. *LaSalle National Bank v. County of DuPage*, 777 F.2d 377 (7th Cir.1985). In *LaSalle National Bank*, plaintiffs' complaint alleged that the County and the Villages of Woodridge and Lisle violated antitrust laws by agreeing to a formula for allocating new sewage connections among themselves in response to IEPA (Illinois Environmental Protection Agency) charges that the consolidated County treatment plants were processing too much waste. The formula was apparently first contained in the two agreements which effected the consolidation of the ownership and management of all sewage treatment facilities in the County. As a part of the consideration for turning over ownership of their own treatment plants to the County, the Villages each reserved the right to a certain number of new connections in the event sewage treatment supply in the County became scarce. The Seventh Circuit also noted that "[a]mong the provisions in the sales agreements was one reserving for each Village the right to determine which users outside the Village would receive sewage treatment service from the sewage treat-

ment plant the Village was selling to the County." *Id.* at 379.

The Seventh Circuit then discussed the applicable Illinois statutes to "first determine whether any state legislative act(s) authorizes the challenged conduct and then determine whether anticompetitive effects are a foreseeable result of the authorization." *Id.* at 381. In light of the succinct analysis by the Seventh Circuit, this Court will excerpt the relevant portions thereof:

> The State of Illinois authorizes counties and municipalities to contract together and combine resources for the provision of sewage treatment. Ill.Ann.Stat. ch. 34, ¶ 3111 (Smith-Hurd 1985 pocket part) (counties "may furnish . . . sewage service . . . to municipal corporations . . . [and] may enter into and perform contracts . . . with any municipal[ity], . . . for the furnishing . . . of . . . sewerage service"); Ill.Ann.Stat. ch. 24, ¶ 11-147-4 (Smith-Hurd 1962) ("Any muncipality lying wholly or partly within the boundaries of any county which accepts the provisions of 'An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties,' [Ill.Ann.Stat. ch. 34, ¶ 3101-3123] may contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality"); Ill.Ann.Stat. ch. 111½, ¶ 1046 (b) (Smith-Hurd 1977) ("in order to be eligible for federal grants for construction of sewage works pursuant to Section 201(g) of the Federal Water Pollution Control Act Amendment of 1972 (P.L. 92-500), any municipality, county, special district or other unit of local government . . . that owns or operates sewage works may adopt . . . ordinances or regulations to provide for systems of proportionate cost sharing for operation and maintenance by recipients of such unit's waste treatment services."). [] The legislature has also expressly authorized the IEPA "to engage in planning processes and activi-

> ties and to develop plans in cooperation with units of local government . . . in connection with the jurisdiction or duties of each such unit. . . ." Ill.Ann. Stat. ch. 111½, ¶ 1004(n) (Smith-Hurd 1977).

Id. at 381-82.

The defendants cite to this Court the exact same Illinois statutes and the Court can only conclude that they apply here, as in *LaSalle National Bank*, to authorize the type of agreement entered into between Lake County and the Village of Grayslake. As in *LaSalle National Bank*, the agreement here was entered into for the purpose of allocating sewage connections between individual municipalities in Lake County and the County itself. The municipalities stopped using their individual treatment plants and agreed to have all of their sewage treated by the County through a series of Interceptors to be built by the County. The goal of these agreements was to provide uniform sewage treatment for the entire County. In exchange, the municipalities received a right to determine which users outside of their boundaries would receive sewage treatment service under the new County-wide system.

The Court concludes that, as in *LaSalle National Bank*, the relevant Illinois statutes authorize counties and municipalities to contract together and combine resources for the provision of sewage treatment. *Id.* at 381. The Court further concludes that the agreement between Lake County and Grayslake, including the "sphere of influence" provision for determining which users outside Grayslake's boundaries would receive sewage treatment, fell within the authorized cooperation between municipalities and counties found in the Illinois statutes in *LaSalle National Bank*.

Turning to the second part of the Seventh Circuit's analysis, the Court again excerpts the relevant portions of *LaSalle National Bank*:

> We think it clear that the Illinois statutory scheme which encourages local units of government to co-

> operate among themselves and with the IEPA in the provision of sewage treatment evinces legislative appreciation of the tension between intergovernmental competition for economic development and pollution control goals, and implicitly sanctions reduced intergovernmental competition.
>
> In sum, free competition and competitive pricing are not the policies underlying the Illinois scheme for sewage treatment. Rather the scheme is one in which local governmental units are encouraged to cooperate in providing sewage service to residences within their boundaries for the common good of the communities they serve. These local and regional decisions regarding sewage treatment are guided by political forces, minimal judicial review, *see Krol v. County of Will*, 38 Ill.2d 587, 590 [233 N.E.2d 417] (1968), and state and national environmental protection laws. Under such a scheme anticompetitive effects are clearly foreseeable and contemplated.

Id. at 382. Finally, in *LaSalle National Bank*, the Seventh Circuit concluded that "the defendants' agreement allocating sewage treatment capacity was authorized and that the Illinois legislature intended that such cooperative agreements not be the subject of federal antitrust suits." *Id.*

In the present case, the Court finds the analysis and result in *LaSalle National Bank* controlling. As it noted above, the Court has already found that the agreement between Grayslake and Lake County was authorized by the same Illinois statutes present in *LaSalle National Bank*. Therefore, it follows that the Court reaches the same conclusion as the Seventh Circuit did in *LaSalle National Bank:* that the Illinois legislature intended that the cooperative agreement between Grayslake and Lake County not be the subject of federal antitrust suits since anticompetitive effects are clearly foreseeable under the legislative scheme for sewage treatment. Accordingly, the Court holds that the doctrine of state action immu-

nity under the antitrust laws applies here to the local government's alleged violative conduct. Since the state action doctrine under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), applies, the jury's verdict and award for the federal antitrust action must be vacated and the action dismissed.

B. ANTITRUST LIABILITY

Even if the state action doctrine does not apply in this case, the Court finds that the jury verdict and award was not supported by the evidence produced at trial. The plaintiff alleged and the jury found that defendants had violated § 1 of the Sherman Act, 15 U.S.C. § 1, through their participation in a contractual agreement which restrained trade within a specific relevant market. *Unity Ventures v. County of Lake*, No. 81 C 2745 (N.D. Ill. January 12, 1984). The Court must now analyze the jury's findings in light of the elements necessary to support the antitrust verdict.

The Sherman Act was designed to protect competition within specific markets. *See M.C. Mfg. Co., Inc. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1064 (5th Cir. 1975), *cert. denied*, 424 U.S. 968, 96 S.Ct. 1466, 47 L.Ed.2d 736 (1976). Section 1 states: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared illegal. . . ." 15 U.S.C. § 1. A violation of the Sherman Act is proven by a "showing that the agreement in question results in a substantial foreclosure of competition in . . . a relevant market." *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346, 1350 (7th Cir. 1982); *U.S. Trotting Association v. Chicago Downs Association, Inc.*, 665 F.2d 781, 790 (7th Cir. 1981) (en banc). Furthermore, the burden of proof for the elements of a violation is on the plaintiff. *Dos Santos*, 684 F.2d at 1350.

1. *Contract, Combination or Conspiracy*

The plaintiff alleges that defendants participated in a contract, combination or conspiracy which resulted in

anticompetitive effects. To prove this allegation, plaintiff entered into evidence a written contract executed by Grayslake and Lake County. (Pl.Ex. 30). The contract, which was reviewed by the jury, conferred upon Grayslake the exclusive right to provide or withhold sewage disposal services within a specified geographic area. This area included the plaintiff's property.

The existence of the contract establishes beyond dispute that defendants intended to, and in fact did, participate in a contractual agreement which gave Grayslake the right to restrain plaintiff's access to sewage disposal services. The Sherman Act, however, does not in and of itself forbid or restrain the power of parties to enter into contracts. *U.S. v. Reading Co.*, 226 U.S. 324, 33 S.Ct. 90, 57 L.Ed. 243 (1912). It is only when the contract results in injury to competition in a relevant market that a violation occurs. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961); *U.S. Trotting Association*, 665 F.2d at 790.

2. *Relevant Market*

The determination of a relevant market establishes the scope of competition within which the effect of an alleged restraint is to be evaluated. The importance of accurately establishing a relevant market is important because any violation of the federal antitrust laws must be appraised in light of a relevant market. *U.S. v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 593, 77 S.Ct. 872, 877, 1 L.Ed.2d 1057 (1957); *Gough v. Rossmoor Corp.*, 585 F.2d 381, 385 (9th Cir. 1978), *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979).

A reelvant market consists of both a product market and a geographic market. *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962); *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S.Ct. 994, 1007, 100 L.Ed. 1264 (1956). A relevant *product* market includes products which are interchangeable, as determined by whether or not the

products can be functionally substituted and by how small a price increase would cause a consumer to switch to a substitute product. *du Pont*, 351 U.S. at 404, 76 S.Ct. at 1012. A relevant *geographic* market consists of the area in which the parties compete for the sale of the products that form the relevant product market. *Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, (5th Cir. 1977), *cert. denied*, 434 U.S. 1087, 98 S.Ct. 1282, 55 L.Ed.2d 792 (1978).

Thus, a plaintiff must present evidence of the substituability of products and the area of competition in order to prove relevant product and geographic markets. In the instant case, plaintiff attempted to establish two relevant markets: one involving competition among developers for the sale or lease of residential, light industrial and commercial properties in Western Lake County; and one involving competition among municipalities for the annexation of developable land in Central Lake County. Each will be analyzed to determine whether there was sufficient evidence to support the jury's finding that a relevant market existed.

(a) *Residential, Light Industrial and Commercial Property*

The plaintiff alleged that the relevant product markets are 1) residential properties and 2) light industrial and commercial properties. Specifically, the plaintiff testified that he intended to build detached single-family homes, attached manor homes and townhouses, and multiple unit apartment buildings. (Tr. 739-44, 996). The homes, manor homes and townhouses would range in price from $40,000 to $60,000 each. The plaintiff also intended to sell residential lots for between $9,000 and $10,500 apiece. (Tr. 745-46, 997, 1121). Evidence was also heard that the plaintiff expected to compete with sellers of new as well as used homes. (Tr. 1130).

To establish the existence of a relevant market for these products, the plaintiff would have to present suffi-

cient evidence for the jury to be able to determine the scope of competition within the market as well as the functional substitutability of the products. *du Pont*, 351 U.S. at 395, 76 S.Ct. at 1007. The plaintiff has failed in this duty.

The plaintiff did not offer sufficient evidence on the volume of new or used home sales in the applicable price range and time frame in Western Lake County. There was evidence on the volume of used home sales, for example, but the data didn't cover Western Lake County, as defined by plaintiff. There was testimony on the number of residential building permits granted, but no indication of how many of these permits resulted in a new home actually being built, or of what type of residential building was being built. Nor did plaintiff offer sufficient evidence on apartment leases in the relevant area. Thus, the jury would not have been able to determine which residential properties could have been functional substitutes for the plaintiff's planned properties.

Similarly, plaintiff did not present sufficient evidence regarding the scope of the light industrial or commercial properties market in Western Lake County. The plaintiff's booklet of data on industrial developments in Lake County as a whole (Pl. Ex. 120-B) did not address itself to which developments were located in Western Lake County, or which developments would have competed with the plaintiff's proposed developments, with regard to either use or price. There was also no evidence on the number of already existing light industrial buildings which would compete with plaintiff's proposed buildings. Therefore, the booklet did not prove the scope of the light industrial properties market, and it supplied no evidence whatever about the relevant commercial properties market.

Plaintiff has also failed to establish Western Lake County as the relevant geographic market for residential, light industrial and commercial property. The boundaries of a relevant geographic market must be drawn

to include the area to which potential buyers could turn to obtain the product, which in this case is residential, light industrial and commercial property. *Tampa Electric*, 365 U.S. at 327, 81 S.Ct. at 628. In determining the appropriate geographic market, plaintiff should employ "a pragmatic, factual approach . . . and not a formal, legalistic one." *Brown Shoe*, 370 U.S. at 337, 82 S.Ct. at 1530. Therefore, the criteria to be used in defining the relevant geographic market are "essentially similar to those used to determine the relevant product market." *Id.*

As we have discussed above, plaintiff has produced insufficient evidence of the volume of new and used homes sold in Western Lake County in any price range during any time period. Moreover, there is no evidence that Western Lake County, defined by plaintiff as the portion of Lake County which lies west of the Tollway, is the area in which potential home buyers would shop for homes. Trial testimony indicated that plaintiff expected potential home buyers to be drawn from throughout Lake County, Northern and Northwestern Cook County and perhaps DuPage County, as well as from other states. (Tr. 772, 1138). Surely, many of these potential customers would be looking for competing homes in areas other than Western Lake County.

It is also unreasonable to assume that corporations seeking light industrial or commercial property would limit their search to Western Lake County. There is no evidence that Western Lake County is a separate market. In fact, trial testimony indicated that plaintiff's proposed light industrial development would directly compete with similar space on the east side of the Tollway.

The Court concludes that Western Lake County as an area does not conform to the commercial realities of shopping for residential, light industrial and commercial property. As such, it is an economically insignificant geographic area and is, therefore, inaccurately defined.

(b) *Annexation of Developable Land*

Plaintiff also alleged that a relevant market existed among municipalities for annexable, developable and in Central Lake County. Plaintiff's argument is that the annexation of developable land is a market transaction whereby both parties benefit. Through annexation, a municipality gains the exclusive right to provide certain services to a development's residences in exchange for a right to levy fees and taxes. In return, a developer receives favorable zoning and an assurance that essential services will be provided by the municipality.

While the annexation of developable land is perhaps not typical, similar markets for services have been recognized by the courts as product markets. In *City of Lafayette v. Louisiana Power & Light Co.*, for example, a municipality was charged with improperly attempting to tie the sale of water to the sale of electricity. 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). The relevant product market in the case was the provision of municipal services. Similarly, in *U.S. v. Philadelphia National Bank*, the Court determined that the relevant product market within which to review allegedly anti-competitive bank mergers was the provision of commercial banking services. 374 U.S. 321, 356, 83 S.Ct. 1715, 1737, 10 L.Ed.2d 915 (1963). The Court agrees with plaintiff's contention that annexable, developable land could constitute a relevant product market.

In asserting that annexable, developable land is the relevant product market in this case, however, plaintiff must still produce evidence regarding the functional interchangeability of developable land. *du Pont*, 351 U.S. at 395, 76 S.Ct. at 1007. In other words, plaintiff must prove that a market exists whereby municipalities compete to annex reasonably interchangeable parcels of developable land. The Court finds that the plaintiff has failed in this proof.

The record contains no substantial evidence or thorough analysis of factors essential to establishing a relevant market such as the number of municipalties competing within the alleged market, total volume of the product in the market area (i.e. how many other parcels were available at that time and were these parcels "reasonably interchangeable"), or the portion of the market that was affected by the defendants' agreement. Without evidence on these factors, the jury could not have reasonably determined the existence of a relevant market under the *du Pont* test of "commodities reasonably interchangeable by consumers." 351 U.S. at 395, 76 S.Ct. at 1007.

Plaintiff has also failed to establish a relevant geographic market to which municipalities could reasonably turn to annex developable lands. A relevant geographic market should conform to the areas of effective competition and to the realities of competitive practice. *F.T.C. v. Rhinechem Corp.*, 459 F. Supp. 785, 788 (N.D. Ill. 1978).

In this case, the realities of competitive practice would dictate that the municipality be very near, if not contiguous with, the annexable property so that it could conveniently and effectively render municipal services. The plaintiff's assertion of Central Lake County as the relevant geographic market could be hypothetically accurate, but, once again, there was insufficient evidence for the jury to have reached such a conclusion. Plaintiff failed to identify even approximate geographic boundaries of Central Lake County. The jury, therefore, did not know which municipalities are located within it, its size, the amount of annexable, developable property it contains or how much, if any, of the land was allegedly foreclosed from competition by the defendants' contractual agreement. In short, there was insufficient evidence to establish a relevant market for either residential, light industrial or commercial property in Western Lake County or annexable, developable land in Central Lake County.

3. *Injury to Competition*

The antitrust laws were enacted for the protection of competition, not for the protection of individual competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Therefore, plaintiff must demonstrate that the alleged conduct of defendants had some market impact, and not just an adverse effect on his business. *Sutliff, Inc. v. Donovan Cos., Inc.*, 727 F.2d 648, 655 (7th Cir. 1984); *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558-59 (7th Cir. 1980); *DeVoto v. Pacific Fidelity Life Insurance Co.*, 618 F.2d 1340, 1344 (9th Cir.), *cert. denied*, 449 U.S. 869, 101 S.Ct. 206, 66 L.Ed.2d 89 (1980).

Even if a reasonable inference could be made that there is a relevant market for residential, light industrial and commercial property in Western Lake County, there is no evidence that competition within that market has been injured by defendants' conduct. Plaintiff claims that he made such a showing, arguing that defendants' conduct affected not only the plaintiff's proposed developments but also the proposed Heartland development. Plaintiff, however, presented no evidence that defendants' conduct prevented the owners of Heartland from developing their property. Nor did he offer proof that the owners of Heartland ever requested sewer service, that any of the defendants ever denied the Heartland developers sewer service, or that the defendants' conduct caused any injury to the Heartland developers.

Moreover, plaintiff did not show whether the Heartland owners intended to build the same type of residential, light industrial and commercial properties included in the plaintiff's alleged relevant product market, or how many of what type of properties the Heartland owners proposed to build. Without this information, the jury could not measure what portion of the relevant market proposed Heartland properties constituted. Further, the

jury could not judge whether that portion, when added to the plaintiff's undefined portion, was a significant and substantial percentage of the alleged relevant market. *DeVoto*, 618 F.2d at 1345. The jury could not reasonably have found that defendants' conduct injured competition without knowing that percentage of the relevant market defendants' conduct affected. *Id.*

Even when the evidence is viewed in a light most favorable to plaintiff, the most plaintiff is able to show is that he has been injured. This is very different from a showing that competition within a relevant market has been injured. Plaintiff has, therefore, failed to meet the market impact standard set forth by the Seventh and Ninth Circuits. *Sutliff*, 727 F.2d at 655; *Havoco*, 626 F.2d at 558-59; *DeVoto*, 618 F.2d at 1344.

Similarly, even if a reasonable inference could be made that there is a relevant market for annexable, developable land in Central Lake County, there is no evidence to support plaintiff's contention that there was any competition among municipalities within that market. There was no evidence that municipalities act any way but independently when they make annexation decisions. Therefore, it cannot be said that injury to competition exists when no competition at all is evident. *Indiana Federation of Dentists v. F.T.C.*, 745 F.2d 1124, 1141 (7th Cir. 1984).

As discussed above, an alleged restraint is not illegal if it affects only a small percentage of the competition for the particular product within the relevant market. *DeVoto*, 618 F.2d at 1345. Plaintiff's assertion that there is injury to competition among developers to annex developable land in Central Lake County would, therefore, fail even if he could prove that a competitive market exists because he provided no proof as to what percentage of the market was foreclosed from competition by defendants' conduct. Furthermore, there was insufficient evidence to show that the alleged market for annexable,

developable land in Central Lake County is any less efficient or that defendants' conduct altered the structure of the market in any way. *Id.* at 1346.

Plaintiff has failed to prove the requisite effect on competition in a relevant market. The jury's antitrust verdict, therefore, cannot be supported.

4. *Conclusion*

In applying the judgment n.o.v. standard set forth in *Tice v. Lampert Yards, Inc.* to the above findings, this Court is compelled to conclude that "the evidence presented, combined with all reasonable inferences permissibly drawn therefrom," is insufficient to support the verdict. 761 F.2d at 1213. The plaintiff's failure to establish either one of two alleged relevant markets or injury to competition within those markets could have formed a sufficient basis for granting defendants' motion for judgment n.o.v. Lack of proof of either a relevant market or injury to competition within that market is sufficient grounds for defeating an antitrust claim. *Gough*, 585 F.2d at 389; *Mercantile National Bank v. Quest Inc.*, 303 F. Supp. 926, 934-35 (N.D. Ind. 1969). Similarly, the assertion of an inaccurate or incorrect relevant market also defeats an antitrust claim. *Madsen v. Chrysler Corp.*, 261 F. Supp. 488, 506 (N.D. Ill. 1966). In the instant case, the jury was faced with insufficient or inaccurate evidence and, therefore, could not reasonably have concluded that plaintiff established a relevant market in which trade was restrained.

Insufficient evidence regarding relevant market and injury to competition was cited as grounds for deciding a motion for judgment n.o.v. in *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954 (M.D. Pa. 1981). The plaintiff in *R.S.E.* was denied judgment n.o.v. because he presented insufficient evidence to prove that a relevant market was unreasonably affected by an alleged price-fixing technique. Similarly, in the instant case, defend-

ants' motion for judgment n.o.v. is granted because the plaintiff presented insufficient evidence of the existence of a relevant product or geographic market, or of injury to competition within those markets.

C. NOERR-PENNINGTON IMMUNITY

Defendants argue that their efforts to oppose the Unity property's zoning and package plant permit are shielded from antitrust liability by the *Noerr-Pennington* doctrine of antitrust immunity. Plaintiffs counter that the *Noerr-Pennington* doctrine does not apply because the lawsuit challenging plaintiffs' zoning and the objections filed with the IEPA challenging the Illinois Pollution Control Board permit for the Unity package plant are "sham" proceedings intended only to delay and injure the plaintiffs' development. Plaintiffs assert that such intent to delay is evidenced by defendants' failure to vigorously pursue the zoning lawsuit.

The Supreme Court has held that bona fide attempts to influence actions of a legislative body are immune from antitrust scrutiny regardless of any anticompetitive motives behind those attempts. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1961). The Supreme Court extended *Noerr-Pennington* immunity to good faith attempts to secure legitimate goals through use of the courts in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972).

The immunity from antitrust liability conferred by *Noerr-Pennington* does not extend, however, to litigation which is merely a "sham." *Id.* at 512-13, 92 S.Ct. at 612-13. In analogizing "sham" litigation to the tort of abuse of process, the Seventh Circuit Court of Appeals has stated: "The line [between protected and unprotected litigation] is crossed when [the defendant's] purpose is not to win a favorable judgment against a com-

petitor but to harass him, and deter others, by the process itself—regardless of outcome—of litigating." *Grip-Pak, Inc. v. Illinois Tool Works, Inc.*, 694 F.2d 466, 472 (7th Cir. 1982). In a more recent case, the Seventh Circuit further defined sham litigation:

> Without a doubt, the intention to harm a competitor is *not* sufficient to make litigation . . . a sham. That anticompetitive motive is the very matter protected under *Noerr-Pennington.* Rather, the prerequisite motive for the shame exception is the intent to harm one's competitors not by the *result* of the litigation but by the simple fact of the *institution* of the litigation.

Winterland Concessions Co. v. Trela, 735 F.2d 257, 263-64 (7th Cir. 1984) (quoting from *Gainesville v. Florida Power & Light Co.*, 488 F. Supp. 1258, 1265-66 (S.D. Fla. 1980) (emphasis in original).

In the present case, the facts are very similar to those presented in *LaSalle National Bank v. County of DuPage*, 777 F.2d 377 (7th Cir.1985). In *LaSalle National Bank*, two villages were charged with violating the antitrust laws by associating together in an attempt to persuade the County Board to deny the special permit and that they did so for anticompetitive purposes. The complaint contained no intimation that the villages abused the political process in seeking to convince the county to deny the special zoning permit. *Id.* at 384 n.6. While it decided that it did not have to reach the issue, the Seventh Circuit commented that "[t]his sort of association for purposes of influencing governmental action would appear to be exempt from antitrust challenge under *Noerr-Pennington.*" *Id.*

In this case, the plaintiffs admit that the clearest evidence of the sham litigation is the fact that the defendants waited until after this Court rejected their abstention motion to institute the state court zoning challenge, and then, took absolutely no steps to prosecute that ac-

tion. If this evidence is the clearest showing sham litigation to which the plaintiffs can point, the Court finds overwhelming evidence presented by the defendants that legitimate concerns underlie the zoning lawsuit and the objections filed with the IEPA challenging the Unity package plant.

Both Lee and Kendig testified about public concern over where the Unity development would get sewer. Lee also testified that she told Alter that the IEPA was not favorable to package plants. Finally, the zoning lawsuit has withstood plaintiffs' motion to dismiss and there is no evidence that the defendants do not intend to pursue that lawsuit, along with numerous other villages surrounding Round Lake Park which joined in filing that action. Therefore, the Court holds that, absent any evidence that they instituted sham litigation against the plaintiffs, defendants' actions challenging the Unity property's zoning and package plant are exempt from antitrust liability under the *Noerr-Pennington* doctrine.

D. CIVIL RIGHTS LIABILITY

Defendants argue that the evidence produced at trial fails to support the jury's verdict on the plaintiffs' equal protection and due process claims. In support of their argument, defendants assert that a violation of equal protection and due process can be found only when the challenged government action is not rationally related to a legitimate governmental objective. Defendants conclude that the denial of sewer services to Unity Ventures was rationally related to legitimate concerns about both the capacity of the Northeast Central Interceptor and the planning of the Unity Ventures and Heartland developments. Plaintiffs argue that the jury rejected both concerns when it returned a verdict of $9.5 million in plaintiffs' favor.

1. *Equal Protection/Due Process Analysis*

Under a substantive due process analysis, the general rule is that, in the absence of legislative direction, a

municipality is the sole judge of the desirability and allocation of sewer services. *Wincamp Partnership v. Anne Arundel County*, 458 F.Supp. 1009, 1025 (D.Md. 1978); 11 E. McQuillin, Municipal Corporations § 31.17; 13 *id.* §§ 37.25-37.32. However, the general rule is limited by the due process clause: a county or municipal corporation must not exercise its police power in an arbitrary, unreasonable, or capricious manner. *Wincamp Partnership*, 458 F.Supp. at 1025-26. *See Moore v. East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion); *id.* at 513, 97 S.Ct. at 1942 (Stevens, J., concurring); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Smoke Rise, Inc. v. WSSC*, 400 F.Supp. 1369, 1383 (D.Md.1975); 1 Antieau, Local Government Law § 5.18. Any exercise of that power must be substantially related to the public welfare. *Wincamp Partnership*, 458 F.Supp. at 1026.

This public welfare/police power analysis as applied to sewer services is consistent with substantive due process and equal protection analysis as applied to government regulation of economic rights. Absent an infringement of a "fundamental right" or the use of a "suspect classification," the rational basis test is the proper standard of review for both substantive due process and equal protection challenges to governmental action. *Chesapeake Bay Village, Inc. v. Costle*, 502 F.Supp. 213, 226 (D.Md. 1980) (alleged purposeful delay of sewer services). Under the rational basis test, the state and county defendants may not exercise their authority in an arbitrary, capricious or unreasonable manner. *Id.* To be sustained, their exercise of authority must be shown to bear a rational relationship to a legitimate governmental objective. *Id. See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976) (equal protection); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (substantive due process).

(a) *Legitimate Government Purpose*

In determining whether any conceivable legitimate government purpose or concern supports the denial of sewer services, the Court first examines the only three federal cases which involve the denial of sewer services alleged to violate due process and equal protection. In *Chesapeake Bay Village, Inc. v. Costle*, 502 F.Supp. 213 (D.Md. 1980), the plaintiff alleged that the state and county defendants used grossly inaccurate population projections in connection with proposals submitted to the United States Environmental Protection Agency (EPA). The EPA subsequently denied the County a grant for a sewage treatment plant large enough to meet the anticipated needs of the plaintiff's development. The alleged purpose behind the inaccurate population submissions was to deny the plaintiff access to adequate sewage facilities for its proposed development. Plaintiff also alleged that the state and county defendants planned to condemn plaintiff's land for a public park, and purposefully delayed the building of sewage treatment facilities in order to lower the value of plaintiff's land. Applying the rational basis test set forth above and assuming all well-pleaded facts as true, the court in *Chesapeake Bay* denied a motion to dismiss plaintiff's substantive due process and equal protection claims.

In *Wincamp Partnership v. Anne Arundel County*, 458 F.Supp. 1009 (D.Md. 1978), the plaintiffs alleged that the combined actions of Anne Arundel County and the State of Maryland resulted in an unreasonable de facto moratorium on growth in the county. The moratorium was allegedly due to the conjunction of a state statute and a county budgeting decision. The state statute forbid the issuance of building permits in localities in which sewage treatment facilities would be inadequate to service the new structures. The plaintiffs did not attack the validity of the state statute. However, they did attack the county's delay in attempting to expand the Pa-

tuxent plant which, in light of state environmental law, had hindered plaintiffs' ability to exploit the development potential of their landholdings.

In response to these allegations, the court in *Wincamp* found that the County's actions appeared reasonably related to the public welfare in terms of geographical extent, duration and purpose. In addition, the court found that the County had not stopped issuing building permits in areas other than the area of plaintiffs' development. The court noted that the County was about to appropriate funds to expand various facilities in order to alleviate the sewage treatment shortage. The court also found it important that the County had developed and was acting, albeit slowly, pursuant to a plan for attacking water and sewage problems occasioned by the County's rapid growth. *Id.* at 1029. The plan was enacted pursuant to state statute.

The court in *Wincamp* concluded, with some hedging, the following:

> To a large extent, given recent state environmental legislation, the issuance of building permits in areas such as Odenton Town Center is beyond the County's control without the expenditure of large sums to upgrade simultaneously sewage treatment facilities in various part of the County. If the County is attempting to meet its sewerage problems in good faith and with reasonable speed and efficiency, then the order in which it deals with affected areas appears to be a matter within the County's discretion, so long as there is no improper motive underlying its priorities [] and a rational, nonabitrary basis for the assignment of priorities. . . . If the County fails to carry through in good faith and with reasonable speed and efficiency its announced purpose to provide increased capacity at the Patuxent plant or if the County indefinitely postpones that expansion with no interim or long-term blueprint to solve plain-

> tiffs' dilemma as developers, plaintiffs will of course be free to commence a new action to enforce their federal constitutional rights.

Id. at 1029-30. The *Wincamp* court held that the County was entitled to prevail on the record presented regarding plaintiffs' substantive due process claims.

Finally, in *Smoke Rise, Inc. v. WSSC*, 400 F.Supp. 1369 (D.Md.1975), plaintiff homebuilders challenged the validity of sewer hook-up moratoria promulgated by the Secretary of Health and Mental Hygiene for certain areas of Montgomery and Prince George's counties. In 1970 the Secretary had found that inadequate sewerage treatment facilities of the Washington Suburban Sanitation Commission (WSSC) constituted a nuisance and menace to public health. Besides imposing the moratoria, the Secretary also ordered the WSSC to undertake certain remedial measures. Thereafter, the WSSC, Montgomery County, and the Department of Health and Mental Hygiene engaged in a complex series of transactions to alleviate the sewerage crisis, but apparently made little tangible progress over the following three years. The homebuilders asserted that the Secretary's orders deprived them of their property without due process of law.

The court in *Smoke Rise* examined the reasonableness of the moratoria orders in terms of their purpose and duration. As to the purpose, the court held that the avoidance of unsanitary conditions was clearly a proper purpose. *Id.* at 1383-84. However, the court also examined the orders to determine whether local officials had prolonged the moratoria in order to implement a tacit no-growth policy. The court concluded that the comprehensive plans to improve waste water facilities belied any hidden purpose to hinder growth. The court also noted the complex interjurisdictional nature of the problem. *Id.* at 1390.

In summarizing the three above cases, the Court concludes that the regulation of sewage treatment facilities

pursuant to state statute and to a comprehensive plan is clearly a legitimate government purpose and concern. The further concern served by such regulation is adequate provision of sewage treatment for new developments, so that real estate development and population growth does not outrun proper and adequate waste treatment facilities.

Therefore, it is clear that the regulation of adequate sewage treatment facilities in relation to new developments is clearly a legitimate government purpose. In addition, it is clear that innocent delay in provision of or a mere denial of sewer services does not, without more, constitute a violation of due process or equal protection. In order to prevail on such a claim, a plaintiff must either set forth an improper motive, *i.e.*, forced condemnation in *Chesapeake Bay*, *supra*, or negate every conceivable legitimate government purpose or concern, as attempted in *Wincamp Partnership*, *supra*, and *Smoke Rise*, *supra*, and thereby leave the inference that the denial of sewer services was arbitrary.

In the present case, defendants set forth two main reasons for the denial of sewer services: (1) regulating or controlling development immediately outside of Grayslake's borders; and (2) protecting and preserving the capacity of the Northeast Central Interceptor. Plaintiffs counter that defendants were never really concerned about capacity because the Gurnee treatment plant had not reached maximum capacity in late 1978, when the denial was made. In addition, plaintiffs argue that Grayslake, a sore loser in the annexation negotiations, was punishing Alter for annexing to Round Lake Park, instead of Grayslake. Essentially, plaintiffs argued at trial that the reasons set forth by the defendants for the denial of sewer services were a pretext to cover up the punitive nature of Grayslake's actions.

A painstaking review of the record establishes that there was not sufficient evidence, when viewed in a light

most favorable to the nonmovant, from which the jury might have found that the plaintiffs' due process and equal protection rights were violated. The plaintiffs utterly failed to meet the burden of showing that the defendants' reasons were either pretextual or not reasonably related to a legitimate government pupose or concern. In determining whether there was sufficient evidence to support the jury's verdict, the jury must have found that, based on the evidence presented at trial, there was no evidence of a legitimate government purpose or concern, or that such evidence was unpersuasive.

Defendants' presentation of evidence can be broken down into three key areas: (1) the negotiations surrounding and the rationale for the sphere of influence clause in the 1976 agreement with the County; (2) the problem of a developer playing one municipality off against another in annexation negotiations; and (3) the need for cooperative or mutual planning of large developments lying between municipalities.

Regarding the sphere of influence, Martin Galantha, Director of the Lake County Public Works Department, characterized it as a "tool for insuring compatible village-county-local planning." (Tr. 134) The sphere of influence arose out of a concern by municipalities, which were giving up local treatment plants, that they might lose some of the ability to control and have decision-making on developments immediately around their communities. (Tr. 134) The sphere of influence or service area was "a way of sharing decision making that would impact the village, sharing that with the County, so that the growth immediately around a community that would be most affected by one [development] would be a mutual or sharing proposition, and that was therefore structured in the contracts." (Tr. 134-35)

Norman Geary, a member of the Lake County Board, testified that the sphere of influence agreement was not

thought of as a veto power but rather as a way of Grayslake and the County working together to develop the land outside of Grayslake. (Tr. 209-10) Geary admits that Grayslake wanted to share in control of the availability of sewer services in the area outside of its borders so that it could share in control of development that might occur there. (Tr. 206) Further, Geary denied that the purpose of the sphere of influence agreement was to diminish the ability of developers to play one municipality off against another merely for the sake of lessening competition. (Tr. 227-28) Lake County put in the sphere of influence provision in order to develop the land properly in conjunction with Grayslake. (Tr. 228)

George Bell, a member of the Lake County Board from 1971-78 and Chairman of the Public Service Committee from 1977-78, testified that the Village Board of Grayslake wanted the sphere of influence because it was concerned that the County might use some of its sewage treatment facilities outside of Grayslake's borders to conduct development under the County's auspices. (Tr. 408)

Geary later testified that Grayslake was concerned about giving up its autonomy, re: handling sewage treatment through its own plant, and it wanted to make sure that sewage treatment would be available to it. (Tr. 1314-15)

Edwin Schroeder, Mayor of the Village of Grayslake, testified that Grayslake was concerned about providing sewer service to its own annexations, especially in light of abandoning its own treatment plant and the burden such an abandonment placed on Grayslake residents. (Tr. 1463)

Lane Kendig, former Director of the Lake County Department of Planning, Zoning and Environmental Quality, testified that Gurnee and the North Shore Sanitary District (NSSD) have agreements with Lake County

which contain sphere of influence and municipal language virtually identical to Grayslake's agreement. (Tr. 1625) Kendig also testified that the Village of Green Oaks has a sphere of influence agreement with Lake County. (Tr. 1631) The Green Oaks' agreement provides that, if land located within the sphere becomes annexed to another municipality, the sphere will not cover that land anymore. (Tr. 1631-32)

Finally, Geary wrote a memorandum in 1979 to the Public Service Committee of the Lake County Board. (Pl.Ex. 112) In that memorandum, Geary discussed the concern which Grayslake expressed during negotiations for the 1976 agreement regarding development in unincoporated areas immediately outside of its borders. The memorandum reads in pertinent part:

> In negotiating for the county with the village of Grayslake there were grave concerns about the developers of the unincorporated areas surrounding Grayslake, mainly the Heartland Development areas surrounding Grayslake to the east and south of Grayslake. The concern was the developers would play one village against the other and use the county's regional system to bring about this reality. As one example—developers could say to the village of Grayslake: "Give us the zoning we want or we will annex to Round Lake Park"—which incidently [*sic*] lies two villages west of Grayslake and is in the Northwest area sewer service area. At that point in time, this did not seem to be a reasonable possibility —even though it had been stated by developers that is what they would do if Grayslake did not accept them on their terms! The county, by contrast, assured Grayslake that we would not be a part of this scheme and we would not supply sewer service to the areas outlined on a map in an exhibit that is part of the County/Grayslake Intergovernmental agreement.

(Pl.Ex. 112 at 2)

The above testimony and Geary's memorandum suggest that the reason for the sphere of influence agreement was to give Grayslake some say in the development of unincorporated areas lying immediately outside of Grayslake's borders. If it still owned its own sewage treatment plant, Grayslake could control development outside of its borders by accepting or rejecting applications to its own plant. Since it abandoned its plant for the good of the County's regionalized sewer system. Grayslake sought to maintain this same control over unincorporated areas, with the County's agreement, through the sphere of influence.

Cooperation between municipalities, such as Grayslake, and counties, such as Lake County, regarding sewer services is recognized by Illinois statute to be helpful and possibly necessary in order to control sewage treatment and pollution. Ill.Ann.Stat. ch. 34, ¶ 3111 (Smith-Hurd 1985 pocket part). Indeed, the impetus for the Lake County regionalized sewer was to clean up the patchwork system of local plants which led to effluents causing problems in bodies of standing water, such as Third Lake. (Tr. 1368, Bell; Pl.Ex. 149; Tr. 238, Geary).

Considering the substantial evidence regarding the County's regionalized sewer system and Grayslake's concern about giving up control over developments in unincorporated areas lying immediately outside of its borders, the Court finds that the evidence shows overwhelmingly that the sphere of influence is related to a legitimate government purpose or concern. This concern about controlling developments in unincorporated areas lying immediately outside of Grayslake's borders is buttressed by the fact that those developments might affect the availability and cost of sewer services to Grayslake residents.

In further support of its finding, the Court notes that the only testimony presented by the plaintiffs on the sphere of influence is that of Robert Degen, former Director of the Lake County Department of Public Works.

Degen testified that Grayslake extended its sphere of influence into an area which he felt the County wished to "let free and see who would be able to handle it." (Tr. 330) Degan nowhere explains what he meant by this statement. A reading charitable to the plaintiffs' case would suggest that the County wanted to keep the area contained in the sphere of influence agreement free for developers to petition the County directly for a hook-up. However, the County never pursued this alleged desire and instead gave Grayslake its sphere of influence. In addition, this unfulfilled County desire is not relevant to the Court's finding that Grayslake had a legitimate government purpose or concern in controlling development, through access to sewage treatments, in unincorporated areas lying immediately outside of its borders.

Plaintiffs make much of the fact that Grayslake's sphere of influence covers the Unity property, which is annexed to another municipality. They argue that it is unreasonable for one municipality to be able to control development in another municipality through access to sewage treatment, and that such control serves no legitimate government purpose or concern. In support of this argument, plaintiffs point to the sphere of influence agreement with the Village of Green Oaks. The Green Oaks' agreement excludes any property presently within the sphere if the property is later annexed to another municipality. If a sphere of influence is proper at all, plaintiffs contend that Green Oaks' agreement is reasonably restricted to meet the government purpose of controlling unincorporated areas lying immediately outside of a village's borders. Plaintiffs conclude that, since Grayslake's agreement does not provide for exclusion from the sphere of property subsequently annexed to another municipality, Grayslake's sphere of influence is not reasonably related to the government purpose.

However, the evidence presented at trial does not support the argument that the 1976 Grayslake sphere of in-

fluence agreement was written with the knowledge that the Unity property would be annexed to Round Lake Park. On the contrary, Geary testified that there was no direct linkage between changing the sphere of influence in 1976 and the likelihood that the Unity property, as well as the Heartland development, would be annexed to Round Lake Park. (Tr. 211) Geary said that it was inconceivable in 1975-76 that Round Lake Park could annex the Unity property, going all the way around Grayslake and still provide services to that property. (Tr. 227-28) The annexation of the Unity property by Round Lake Park was possible only after the Illinois courts approved in late 1976 a controversial strip annexation of the Stuart Farm by Round Lake Park.

In light of the above evidence, the Court finds that there is no evidence to suggest that Grayslake purposefully extended its sphere of influence in 1976 to cover land annexed by another municipality. Assuming for the sake of the plaintiffs' case that the Green Oaks' agreement is the optimum in this type of agreement, the fact that Grayslake's sphere of influence does not contain an exclusion provision and therefore may not be perfectly drawn does not mean that Grayslake's sphere of influence is not reasonably related to the legitimate government purpose. The rational basis test under substantive due process and equal protection analysis does not require that legislation or governmental action be a perfect fit with the legitimate government purpose or concern. The Court has already found that the sphere of influence agreement is reasonably related to a legitimate government purpose. This finding is not affected by the slight overbreadth of Grayslake's sphere of influence, especially when the Unity property was annexed after the Grayslake agreement was executed.

(b) *Reasonably Related To The Government Purpose*

Even if the sphere of influence agreement is related to a legitimate government purpose or concern, as the

Court found, the denial of sewer services could still be arbitrary and capricious. The denial is arbitrary and capricious only if it is totally unrelated to the government purpose underlying the sphere of influence agreement.

As discussed above, one of the concerns which led to the sphere of influence agreement was that a developer could play one municipality off against another to get favorable annexation terms. This tactic could have the bad side effect of an annexation impacting on the surrounding communities because the annexing municipality received inadequate contributions from the developer to put toward providing the services which the new development would require.

The defendants argue that the above scenario occurred in this case. They argue further that they attempted to control the bad effects of the Unity property's annexation to Round Lake Park on Grayslake and other municipalities. They did this by conditioning that property's sewer hook-up to an agreement with Round Lake Park to conduct mutual planning regarding the Heartland development.

The following evidence was presented at trial regarding the ability of a developer to play one municipality off against another in annexation negotiations and the effects caused by such a tactic. Kendig testified that playing one municipality off against another can be a very destructive process. (Tr. 1638) Kendig further testified that annexations can be detrimental because they impose burdens on a neighboring property. (Tr. 1626) Kendig said that some municipalities want to annex out of fear:

> It is not uncommon for developers to either subtly or unsubtly threaten that if they don't get their way, they will annex to somebody else and the implication is to the Village, "My gosh, that other village will

> not do nearly as good as my village will do in controlling this thing, so I had better annex it not because I want it but because I want to protect my residence [sic] from its adverse impact."

(Tr. 1627) Finally, Kendig said that the County's sewer regionalization has vastly increased a developer's ability to draw a number of municipalities into competition for annexation. (Tr. 1628)

Geary testified that annexations can have an impact on municipalities other than the one annexing. (Tr. 232-33) In his memorandum to the Public Service Committee, excerpted above, Geary wrote that the "concern was the developers would play one village against the other and use the county's regional system to bring about this reality." (Pl.Ex. 112 at 2)

Eve Lee, Chairman of the Lake County Regional Planning Commission, testified about the preannexation hearing of March 31, 1976 for the Unity property. Lee spoke to the Round Lake Park Board about where sewer was going to come from for the Unity property. (Tr. 1404) She spoke to Alter after the meeting about the concern over where sewer services would come from. Alter said not to worry because he would build a package plant if he had to. (Tr. 1406) Lee suggested that Alter talk to Grayslake about annexation because sewer services would be easier to obtain there. (Tr. 1406) He responded that "he felt that he couldn't deal with Grayslake, that he had a better opportunity to do what he wanted to do in the Vilage [sic] of Round Lake Park." (Tr. 1407)

Bell testified about a letter from the Fremont Township Board of Auditors to the Round Lake Park Board, dated March 10, 1976. This letter expressed concern over the lack of planning and lack of information disseminated to the public regarding the Unity property's annexation. (Tr. 1358) At the preannexation hearing, Bell asked how Alter expected to get sewage treatment. Alter

responded that he expected to place a package sewage plan on the Stuart property. (Tr. 1395-96)

Schroeder testified that the annexation of the Unity property under the terms agreed upon by Round Lake Park would not have been attractive to Grayslake because "they gave away the store." (Tr. 1470) Schroeder explained that, in his opinion, Round Lake Park had not received enough compensation, in terms of dedicated land and utilities, in return for annexation and the services to be provided by the village. (Tr. 1471)

The above evidence shows that inadequate planning can result from a developer playing one municipality off against another in annexation negotiations. This inadequate planning affects municipalities surrounding the annexed property because the annexing municipality is unable to provide adequate services to the new development. These services, such as traffic control, schools, fire and police protection, water and sewer, are usually funded substantially by the developer, either in terms of cash contributions per acre or in actual acreage contributed to the municipality. However, when a developer plays one municipality off against another in annexation negotiations, it can receive extremely favorable annexation terms, which make the development less expensive. The concomitant effect of such extremely favorable annexations is an inability of the annexing municipality to provide services for the new development. Therefore, the burden falls on surrounding municipalities to provide services, even though paid for, to the new development.

Inadequate planning and the burden imposed on neighboring villages was also a concern regarding Round Lake Park's annexation of the Heartland development. At a preannexation meeting for the Heartland development, Lee asked Round Lake Park officials to hold off on the annexation because there was insufficient planning and information regarding impact on surrounding communities. (Tr. 1413) Kendig testified that the Lake County

Department of Planning, Zoning and Environmental Quality made recommendations which made annexation of the Heartland development more expensive to the developer. (Tr. 1569) The Department of Planning, etc. suggested that the Heartland developers make a greater financial commitment for public services in connection with the annexation. (Tr. 1569-70)

Kendig told Round Lake Park officials that the Heartland development would have "adverse impacts on the county, surrounding villages and other special districts" due to "a severe lack of planning." (Tr. 1573) When he was asked if developers, especially Alter, should be allowed to develop their property, Kendig replied: "I think if we had a situation where the village that was allowing him to do that had the opportunity to bear all of the costs and other municipal agencies were not having to take a gamble along with Mr. Alter, I would say fine." (Tr. 1646) Finally, Alter acknowledged that opposition to his package plant was linked to opposition to the Heartland development. (Tr. 763)

The above testimony illustrates the bad effects which are caused when a developer plays one municipality off against another in annexation negotiations. The inability of the annexing municipality to provide adequate services, either pre-existing or to be funded by the developer, imposes a burden on surrounding municipalities and their capacity to provide services to their own developments. The result of such a burden can be a refusal by the surrounding municipalities to provide services to the other municipality's development in an effort to preserve services for their own developments. (Tr. 1463, Schroeder, Pl.Ex. 111) If there is a refusal, the annexing municipality would have to take its chances in trying to provide the services itself.

In the present case, there was a refusal by Grayslake and Round Lake Park attempted to build a package plant for the Unity property. However, there was and is no

guarantee that Round Lake Park will receive ultimate permission from federal and state authorities to build the plant, especially in light of the potential environmental impact on surrounding areas. (Tr. 39, Byers; 1404, Lee) If the plant permit is denied, the developer who had bargained so well and gained many concessions will be left without adequate sewer services and with the prospect of delayed or altered development. This result to the developer is unfortunate but hardly undeserved in light of the developer bargaining too well for favorable annexation terms without a view to the reality of who would provide or fund sewer, as well as other, services.

The other unfortunate aspect of this case is that this delay in development, to the developer's detriment, could have been avoided by careful mutual or cooperative planning of the Unity and Heartland developments. Indeed, there was overwhelming evidence presented at trial that Grayslake attempted to achive such mutual and cooperative planning with Round Lake Park regarding the Heartland and Unity developments. The main evidence of this attempt is the resolution passed on December 22, 1980 by the Grayslake trustees. The resolution provides in pertinent part:

> That the Village of Grayslake agrees to the connection of the Unity Ventures Development (see Exhibit A attached) to the County Interceptor located within the Village of Grayslake's "Sphere of Influence" with the understanding that the Village of Round Lake Park and the Village of Grayslake will enter into a written agreement to mutually plan the area known as "Lake Properties' Venture" [sic] lying south of Route 120 (see Exhibit B attached) and to enter into no annexation or other agreement with said "Lake Properties Venture" (Exhibit B) pertaining to said area without the consent of the other Village.

(Pl.Ex. 92)

Plaintiffs' counsel portrayed this resolution as Grayslake's attempt to extort or bully a concession from Round Lake Park, in exchange for Unity's sewer hook-up, that it would not annex the Heartland development because Grayslake wanted to annex it. However, there is absolutely no evidence in the record from which to attribute this improper purpose to the December 22, 1980 resolution. In fact, Schroeder's uncontradicted testimony is that Mr. Parkham, a Round Lake Park trustee, suggested the compromise embodied in the resolution. (Tr. 1465-66)

According to Schroeder, Grayslake was willing to consent to the Unity property's hook-up in exchange for a written agreement to mutually plan the Heartland development, in light of adequate sewer capacity. (Tr. 285) Grayslake was not trying to extract from Round Lake Park a concession that it not annex Heartland without Grayslake's approval. (Tr. 285) Rather, the resolution sought a mutual agreement that neither village would annex the Heartland without mutual or cooperative planning. (Tr. 285-86) Unless such an agreement was reached, Grayslake would not consent to the Unity property's hook-up. (Tr. 286) Schroeder later told Bernard Ruekberg, one of Alter's assistants, that he did not think that it was a good idea for Round Lake Park to annex the Heartland development. (Tr. 290)

George Scherer, Mayor of Round Lake Park, testified that Schroeder said that, if Round Lake Park would agree to work with Grayslake on the Heartland development, Grayslake would possibly give a sewer hook-up to the Unity property. (Tr. 572) In his conversation with Ruekberg, Schroeder said that the intent of the resolution was for Round Lake Park to give Grayslake a chance to help Round Lake Park plan the Heartland development and that the minute the proposal was signed, Grayslake would let the Unity property connect right

away to the Northeast Interceptor. (Tr. 617, Ruekberg; Pl.Ex. 126)

Lee testified that Schroeder called her to see if cooperative planning of the Heartland development was possible. (Tr. 1416) In fact, Lee, Bengson, and Schroeder met at Lee's home and the two mayors agreed at this meeting that the Boards of Grayslake and Round Lake Park would meet together. (Tr. 1417-18) Regarding Schroeder's explanation for Grayslake's refusal to give its written consent to the Unity property's hook-up, Lee said that Schroeder's concern was toward planning the whole area and how the developments would be serviced. (Tr. 1435) Finally, Lee said that Grayslake was only trying to engage in cooperative planning with Round Lake Park, "which is what it was we were trying to do in the first place. That was our charge from the County Board, to get municipalities to begin talking to one another about what was going to happen on their boundaries." (Tr. 1440)

Kendig recommended that "the cooperative planning that was then going on with the County, the comprehensive plan, that the effort be projected into this particular controversy and that hopefully Round Lake Park and Grayslake and the County would sit down and work out a land use plan for the area that would enable the various jurisdictions to adequately support the proposed or a given level of development." (Tr. 1591) Finally, Kendig testified that the Heartland, Unity and Stuart Farm developments had to be treated together for planning purposes because they were all annexed by Round Lake Park and would rely on the County's facilities for some services. (Tr. 1574)

The above evidence shows overwhelmingly that mutual or cooperative planning of the Heartland and other developments was a desired and rational goal and that such planning was the purpose behind the December 22, 1980 resolution. The Court has already found that the

sphere of influence agreement was reasonably related to a legitimate government concern or purpose, *i.e.*, control of developments lying immediately outside of Grayslake's borders. Since the sphere of influence agreement is a reasonable method for controlling developments lying immediately outside of Grayslake's orders, its use to further mutual or cooperative planning of developments lying between Grayslake and Round Lake Park, which is a desirable and rational goal, must also be reasonable.

Therefore, the Court holds that there was not sufficient evidence on which the jury could conclude that the conditional grant of the Unity property's hook-up as embodied in the December 22, 1980 resolution, was arbitrary, capricious or improper. Rather, the Court holds that the evidence presented at trial shows conclusively that, not only was Grayslake's denial of sewer services reasonable under the sphere of influence agreement, but also the conditional grant of the Unity property's hook-up in exchange for mutual or cooperative planning of the Heartland development was reasonably related to controlling and mutually planning development lying between Grayslake and Round Lake Park.

E. CIVIL RIGHTS IMMUNITY

Defendants argue that the County Board members and village trustees who are sued in their individual capacities are immune from damages under either absolute or qualified immunity. Defendants argue that the Board members and village trustees are immune from damages under absolute immunity because they were acting as legislators when they entered into the sphere of influence agreement. In addition, defendants claim that the village trustees acted as local legislators when they denied the Unity property's sewer hook-up. Plaintiffs counter that the hook-up denial did not involve the promulgation of legislation, was a discretionary determination with respect to a single parcel of land, and therefore is not entitled to absolute immunity.

Reed v. Village of Shorewood, 704 F.2d 943, 952-53 (7th Cir. 1983), holds that local officials are absolutely immune from liability for actions taken in a legislative, as opposed to an administrative, capacity. Legislative acts involve "the promulgation of general or prospective legislation or establish guidelines by which the future conduct of certain groups is to be judged." *Coffey v. Quinn*, 578 F. Supp. 1464, 1467 (N.D. Ill. 1988). Administrative acts involve the application of already enacted ordinances or recognized policies to specific instances.

Against this background, the Court finds *LaSalle National Bank v. County of Lake*, 579 F. Supp. 8 (N.D. Ill. 1984) to be dispositive of the absolute immunity question here. In that case, the same plaintiffs challenged the same actions taken by the same defendants under a sphere of influence agreement. The court concluded that some acts were legislative and some were administrative:

> However, it appears that not all of the alleged actions were taken in a legislative capacity. For example, the decision by the Lake County Board and the Village of Grayslake to give the Village of Grayslake a veto over sewer applications within Grayslake's sphere of influence appears to have been legislative, because it was a decision of general application. However, the decision by the Village of Grayslake to deny the specific application of plaintiffs appears to have been an administrative action, since the trustees were then considering a specific proposal by a specific group and doing so in their capacity as administrators of an already-passed law.

Id. at 13.

The Court agrees with the analysis and result in *LaSalle National Bank*. Therefore, the County Board members, the village trustees and Mayor Schroeder are

absolutely immune from damages for any acts surrounding the negotiation and enactment of the sphere of influence agreement. However, the village trustees and Mayor Schroeder are not entitled to absolute immunity for their acts denying the Unity property's sewer hook-up. To the extent that the village trustees and Mayor Schroeder acted in an administrative capacity in denying the hook-up, they are entitled to only qualified immunity. *Id.* at 13 n.7. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

In *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court removed the subjective good faith element from determinations of qualified immunity. The objective standard in *Harlow* shields public officials from liability for damages "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. at 2738. *Harlow* establishes a two-part test. First, the court must look to currently applicable law and determine whether that law was clearly established at the time the action in question occurred. *Id.* If the law was not clearly established, the public official will be immune. Second, if the law was clearly established at the time the action occurred, the public official must show that, because of extraordinary circumstances, "he neither knew nor should have known of the relevant legal standard." *Id.* at 819, 102 S.Ct. at 2738.

In the present case, the law applicable to constitutional violations for denial of sewer services was and is not clearly established. While the law applicable to analogous cases involving denial of zoning variances and building permits is clearly established, what constitutes an arbitrary and capricious denial of sewer services is not easily defined by case law. In the same vein, what constitutes a legitimate government purpose or concern must be determined on a case-by-case basis. Therefore, since it

finds that the applicable law was and is not clearly established, the Court holds that the village trustees and Mayor Schroeder are entitled to qualified immunity from damages relating to possible violations of plaintiffs' civil rights.

IV. CONCLUSION

For the reasons stated above, defendants' j.n.o.v. motion is granted for both the antitrust and civil rights verdicts. Accordingly, the conditional motion for a new trial is denied and judgment is entered in favor of the defendants.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number 81 C 2745

UNITY VENTURES, *et al.*

v.

COUNTY OF LAKE, *et al.*

March 19, 1986

Plaintiffs' Motion For Injunctive Relief and For Judgment On Count III Is DENIED. Judgment In Defendants' Favor Is Entered On Count III.

ORDER

Before the Court is the plaintiffs' motion for injunctive relief and for judgment on Count III, which alleges a violation of procedural due process. For the reasons stated below, plaintiffs' motion is denied and judgment is entered in defendants' favor on Count III.

After trial of this action, the Court reserved ruling on planitiffs' procedural due process claim (Count III) and on plaintiffs' motion for injunctive relief. Plaintiffs' motion for injunctive relief sought to effectuate a jury verdict in plaintiffs' favor and to allow plaintiffs to hook up the Unity property to the Northeast Central Interceptor for sewer service. In its opinion dated today, March 19, 1986, the Court granted defendants' j.n.o.v. motion and set aside the jury verdict on the antitrust and

civil rights claims. Accordingly, plaintiffs' motion for injunctive relief to effectuate the jury verdict in plaintiffs' favor is denied.

Regarding the procedural due process claim (Count III), Magistrate Lefkow's Report and Recommendation, adopted by the Court on February 23, 1983, denied defendants' motion to dismiss Count III on a narrow ground. First, the Magistrate found that no federally protected or state-law created right which would entitle plaintiffs to sewer service. However, the Magistrate did find a protected property right to develop land in a legitimate manner without arbitrary abridgement of the development. *See Washington ex. rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). Absence of arbitrary abridgement is assured by the requisite fundamentally fair procedures in a governmental decision to restrict the manner in which th land is developed.

In the present case, the Court's opinion granting the defendants' j.n.o.v. motion stated that the sphere of influence agreement was reasonably related to a legitimate government purpose. Therefore, the sphere of influence cannot be an unreasonable delegation of unfettered power to Grayslake. Furthermore, the Court found that the denial of sewer hook-up was reasonably related to Grayslake's legitimate concern about controlling developments lying immediately outside its borders. The Court concludes that the procedures used to deny the Unity property's sewer hook-up were not fundamentally unfair.

/s/ Nicholas J. Bua
NICHOLAS J. BUA

APPENDIX G

JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

March 9, 1988

Before

HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Senior Circuit Judge*

Nos. 86-1620 and 86-1706

UNITY VENTURES, an Illinois partnership, LASALLE NATIONAL BANK, as Trustee under Trust No. 103331, and WILLIAM ALTER,

Plaintiffs-Appellants, Cross-Appellees,

vs.

COUNTY OF LAKE, VILLAGE OF GRAYSLAKE, NORMAN C. GEARY, GEORGE BELL and EDWIN M. SCHROEDER,

Defendants-Appellees, Cross-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

No. 81 C 2745—NICHOLAS J. BUA, Judge

Entered March 11, 1988

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this date. Costs in this court are waived.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 5, 1988

Before
HON. WALTER E. CUMMINGS, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. JESSE E. ESCHBACH, *Senior Circuit Judge*

Nos. 86-1620 and 86-1706

UNITY VENTURES, an Illinois partnership,
LASALLE NATIONAL BANK, as Trustee under
Trust No. 103331, and WILLIAM ALTER,
Plaintiffs-Appellants,

vs.

COUNTY OF LAKE, VILLAGE OF GRAYSLAKE,
NORMAN C. GEARY, GEORGE BELL and
EDWIN M. SCHROEDER,
Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 81 C 2745—Nicholas J. Bua, Judge

Chief Judge William J. Bauer and Judge Frank H. Easterbrook did not participate in any consideration of the petition for rehearing *in banc* filed in the above cause.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by plaintiffs-appellants on April 11, 1988, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

No. 88-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM ALTER, UNITY VENTURES, and LASALLE NATIONAL BANK,
Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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No. 88-282

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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1. Respondents' lengthy recital of their jury arguments is unnecessary, because the only relevant facts are those few and simple ones relied on by the Court of Appeals for its legal ruling. Holding a matter of law that petitioner had not satisfied the ripeness requirements of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court of Appeals nevertheless acknowledged:

—Petitioner "submitted to the Lake County Public Works Department two plans for the connection," A. 5a, which were "approved," *id.*, until the Grayslake Trustees issued their "rebuff." A. 6a; see also A. 43a.

—In the Court of Appeals' words, "When Alter met with Mayor Schroeder and others October 31, 1978, Schroeder, *speaking with the knowledge and approval of the Board of Trustees, told him that Grayslake would not consent at that time* to the Unity property connecting to the Northeast Interceptor." A. 10a (emphasis supplied). It was undisputed that the mayor at the same time announced "there is no use talking about density or anything else," and that "he didn't know at what time" Grayslake would "even consider" petitioner's proposal. T. 753.[1]

—After Grayslake's refusal, his village for petitioner "appealed Grayslake's veto of Alter's requested sewage connection to the Lake County Board," which took no action in spite of its counsel's opinion supporting petitioner. A. 5a-6a.

—Later, after petitioner failed to assist them in blocking another developer, "the Grayslake trustees on February 2, 1981, unanimously rescinded their earlier resolution to consider allowing the Unity Property to connect to the Northeast Interceptor," A. 7a,[2] and further filed objections to block petitioner from building a separate treatment plant. A 6a-7a.

Only then did petitioner finally sue.

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[1] The District Court found that petitioner suffered "the denial of a sewer hook-up," A. 93a, because "[i]n the present case, there was a refusal by Grayslake," A. 84a, that "any more formal application would have been futile," A. 25a-40a, and that under Illinois procedure "there is no requirement of a particular formalized application process." A. 25a. Respondents argue in this Court that petitioner should have gone to the Illinois Environmental Protection Agency, Br. Op. 4; in the District Court they conceded that such an application would not have been considered unless the county joined it. A. 26a.

[2] It was undisputed that adequate capacity to accommodate petitioner was available at all times, T. 365, and that Grayslake consented to connections by other developers who had agreed to annexation by Grayslake, T. 304-08.

The Court of Appeals nevertheless held as a matter of law, based on its reading of *Williamson County*, that petitioner should have gone back and after three years "should have sought formal approval of his request for a sewer connection from the Grayslake Board of Trustees at a regular meeting," A. 12a, and that "thus," A. 10a, his claims that he had been denied equal protection, procedural due process and substantive due process should not have been heard.

The simple question is whether the Court of Appeals' legal ruling was right. First, does *Williamson County* apply to a non-taking § 1983 case at all? Second, after a § 1983 plaintiff has been authoritatively informed that he is turned down, appeals unsuccessfully, is blocked by other improper actions while other applicants are approved, and later is again informed by a formal resolution that he will not be considered, has he not finally done enough to file a § 1983 civil rights claim in federal court?

2. Respondents say nothing at all about—in fact, they do not even cite—*Felder* v. *Casey*, 108 S. Ct. 2302 (1988), discussed at length at Pet. Cert. 15, 22, 23. *Felder* held that § 1983 does not "force[] injured persons to seek satisfaction from those alleged to have caused the injury in the first place," or "to seek redress from the very state officials whose hostility to those rights precipitated those injuries." 108 S. Ct. at 2311, 2312.

3. Respondents say nothing at all about petitioner's § 1983 claim that he was denied *procedural* due process. The Seventh Circuit, lacking the benefit of this Court's subsequent decision in *Felder* v. *Casey*, *supra*, simply held that the "procedural due process claim is not ripe" and erroneously interpreted § 1983 and *Williamson County* as remitting petitioner to the tender mercies of the very officials whose persistent devices he was complaining of. A. 13a. The Ninth Circuit, by contrast, has said it doubts that *Williamson County* applies to pro-

cedural due process claims at all. *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1495 (9th Cir. 1987).

4. The Court of Appeals itself here recognized that whether *Williamson County* applies here is an open question, not yet ruled upon by this Court. A. 8a-9a. It resolved that question by holding that although "[t]he Supreme Court's recent discussion of ripeness has been in the context of regulatory taking claims," nevertheless "the ripeness analysis used in those cases applies as well to equal protection and due process claims." *Id.*

Several Circuits now have looked at that same question, and come to differing conclusions. The Eighth Circuit in at least two cases has held "taking" claims "not yet ripe" under *Williamson County* while at the same time holding that parallel § 1983 due process claims were ripe. *Mitchell* v. *Mills County*, 847 F.2d 486, 488 (8th Cir. 1988); *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986). The Ninth Circuit likewise, again contrary to the Seventh here, holds that "*Williamson* does not require us to apply the identical ripeness standard for takings to . . . substantive due process, procedural due process and equal protection claims," and that such differing claims "are not fungible." *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1499, 1498 n.7 (9th Cir. 1987). On the other hand, as respondents correctly point out, the Eleventh Circuit, like the Seventh here, has concluded that in *Williamson County* "the Supreme Court implicitly ruled that the same ripeness test must be applied to both [due process and taking] claims." *Corn* v. *City of Lauderdale Lakes*, 816 F.2d 1514, 1516 n.2 (11th Cir. 1987).

5. Because this was a § 1983 action complaining of a whole course of conduct to deny Fourteenth Amendment rights, extending over several years, respondents' discussion of cases about statutes challenged "on their face" or "as applied" is quite irrelevant. Petitioner here was not

challenging the facial validity of a statute or regulation; the District Court found that "the acts complained of have already occurred." A. 26a, 84a, 93a. Nor is this a case where, as respondents incorrectly say, "Petitioner had one meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service." Br. Op. 4. As the complaint alleged and as the jury found, at issue were what the District Court called a whole "series of wrongful acts" by respondents, A. 43a, cumulating over a period of three years, designed unlawfully to block him at every turn, even from building his own treatment plant. See Pet. Cert. 10-11. To hold that such a series of concerted, completed acts could not state a ripe tort claim under § 1983 is to take away much of the force of that statute. The Seventh Circuit here is in clear conflict with, for example, *Bello* v. *Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1968, in which the Third Circuit held that a § 1983 claim was ripe when it alleged "that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process." See Pet. Cert. 17.

6. Respondents misstate the holdings of recent cases in other Circuits. For just two examples:

—In *Sullivan* v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986), the Second Circuit saw no ripeness obstacle to a § 1983 due process claim of improper denial of an occupancy certificate, even though there was less official action than here—in that case, merely a negative statement by the first selectman and a building official—and the plaintiff chose to forgo a specifically prescribed legal recourse to a town meeting. See Pet. Cert. 20. Respondents' irrelevant quotation from a different section of that opinion, Br. Op. 25, was followed by the court's observation that "Sullivan's certificate of occupancy claim, however, rests on a different footing . . . ." 805 F.2d at 84.

—In *Neiderhiser* v. *Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1969,

which respondents are unable to distinguish in any coherent way at all, see Br. Op. 25, the Third Circuit held a § 1983 due process claim ripe even though an initial denial of a zoning exemption was later reconsidered and actually *granted*. There is no way that that § 1983 claim can be heard and this one not.

7. Respondents also are unable to justify or explain the Seventh Circuit's novel ruling that Sherman Act claims can be unripe even after acts in restraint of trade have been committed. When they say that "ripeness was never raised nor even mentioned" in *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988), see Br. Op. 28, they are correct, but they really underscore the point. If *Williamson County*'s ripeness test for taking cases applied to the Sherman Act, then *Patrick* v. *Burget* could not have been decided as it was. See Pet. Cert. 26-27. Ripeness was not considered to be an obstacle in *Patrick*, even though the plaintiff there had not sought relief through the peer-review process at all.[3]

* * * *

Petitioner believes that this Court when it sensibly decided *Williamson County*—in the peculiar context of zoning procedures and "taking" claims—did not mean to block ordinary § 1983 suits alleging a course of tortious actions by state officials to deny procedural due process, substantive due process, and equal protection of the laws. The full meaning and implications of *Williamson County* have been called "a puzzle," creating "difficulty" for the lower courts.[4] *Williamson County*'s meaning outside the

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[3] Respondents also do not discuss or deny the conflict on this point with Eighth and Ninth Circuit cases cited at Pet. Cert. 27. Their argument, Br. Op. 29, that state-action immunity should apply, goes to merits; although petitioner could demonstrate at length that the Court of Appeals erred in its dictum on that point, that issue is not before this Court because the holding below relied on ripeness.

[4] *HMK Corp.* v. *County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985); *Kaiser Dev. Co.* v. *City and County of Honolulu*, 649 F. Supp. 926, 941 n.18 (D. Haw. 1986).

"taking" context, if it has one, is a recurring question that will have to be addressed, and better sooner than later. The present record demonstrates probably the most extreme interpretation of that decision to date. The Seventh Circuit put the inevitable issue plainly and simply.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted and the judgment vacated or the case set for argument.

Respectfully submitted,

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September 30, 1988

No. 88-282 (4)

In The

Supreme Court of the United States

October Term, 1988

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW RESTATED

1. Whether the Seventh Circuit Court of Appeals properly determined that petitioner failed to satisfy the most basic threshold of ripeness in that "Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity..."? *See Unity Ventures v. Lake County*, 841 F. 2d 770, 775 (7th Cir. 1988).

2. Whether, even if Petitioner's claims were ripe, the Seventh Circuit's decision should be affirmed based on the finding of the District Court that "A painstaking review of the record establishes that...[petitioner] utterly failed to meet the burden of showing that the defendants' reasons were either pretextual or not reasonably related to a legitimate government purpose or concern"? *See Unity Ventures v. County of Lake*, 631 F. Supp. 181, 200 (N.D. Ill. 1986).

3. Whether the Seventh Circuit Court of Appeals properly determined that petitioner's antitrust claim was barred by the state action doctrine?

4. Whether the District court properly granted judgment and judgment N.O.V. for all defendants on all counts?

STATEMENT REQUIRED BY RULE 28.1

Respondents Village of Grayslake and County of Lake are municipal corporations that have no parent companies, nor any affiliates or subsidiaries.

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No. 88-282

WILLIAM ALTER, UNITY VENTURES, and LA SALLE NATIONAL BANK,

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EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,

Respondents.

Petition For a Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully request that the Petition for Writ of Certiorari be denied.

STATEMENT

Recognizing an advocate's obligation to portray facts most favorably to his client, petitioner's statement of the "facts" nevertheless conveys a seriously distorted picture of the case. Respondents address the most serious distortions in Part I of their argu-

ment.

Petitioner's summaries of the District and Circuit Court opinions are also distorted. In essence, the District Court, after erroneously denying respondents' pre-trial motion to dismiss for lack of ripeness, granted respondents' post-trial motion for judgment N.O.V. on the basis that petitioner "utterly failed" to prove any violation of either the civil rights or antitrust laws. Pet. 75a.

The Seventh Circuit held that the trial court erred in even letting the case proceed to trial because "[petitioner] failed to make any effort to obtain a final, reviewable decision before any governmental entity...." Pet. 10a.

REASONS FOR DENYING THE WRIT

I. PETITIONER'S STATEMENT OF THE FACTS MISCHARACTERIZES THE NATURE OF THE CASE

A. There Was Nothing Improper About the Sewer Agreement Between Lake County and Grayslake

Petitioner does not challenge the facial validity of the Grayslake sewer agreement. Pet. 14a. There is no basis for such a challenge. Judge Bua, the trial judge, found that the agreement was valid under Illinois law and executed for constitutionally proper purposes. Pet. 55a, 78a, 87a-88a. Nevertheless, in an effort to get his case before this Court, petitioner attempts to cast the agreement in a sinister light. Petitioner refers to it as "previously undisclosed," as containing a "veto power [that] was absolute and not subject to any prescribed standards," and as being unlike other sewer agreements executed by Lake County. Pet., p. 6.

None of this innuendo finds support in the record. The Grayslake agreement, PX 30, along with numerous similar agreements, DX 135a-135-jj, was executed as part of, and as a requirement of, a federal clean water program designed to replace numerous, inadequate village sewer plants with a system of large regional plants, Tr. 79-83. Prior to regionalization,

Grayslake operated its own sewer plant and, under Illinois law, this gave it some control over development in areas immediately surrounding its boundaries. Tr. 154-55; Pet. 78a. To induce Grayslake to participate in the regional system, Lake County agreed to allow the village, like many other municipalities, to retain some of this control through a "sphere of influence" provision in its agreement. Tr. 153-58; DX D; Pet. 76a-77a.

This "sphere of influence" provision, which petitioner now characterizes as a standardless "veto," said simply:

> The county shall preserve the function of the county interceptors located within the sphere of the village...by not permitting any direct connection thereto...unless the village consents in writing to such direct connection.

PX 30, p. 8. Thus, by its terms, the agreement limited Grayslake's right to withhold its consent to situations in which (1) a direct connection (*i.e.* a large connection, too large to connect through any existing system's connection) to the interceptor sewer that Grayslake had contracted to use (2) threatened the functional ability of that interceptor to provide that contractual service. Those standards are perfectly sufficient under Illinois law, *Airtex Products, Inc. v. Pollution Control Board*, 15 Ill. App. 3d 238, 242-43, 303 N.E.2d 498, 502 (5th Dist. 1973), *aff'd*, 60 Ill. 2d 204, 326 N.E.2d 406 (1975).[1]

Eight other Lake County sewer agreements had provisions similar to the Grayslake "sphere of influence" provision. *See* DX D, 135b, 135v, 135x, 135cc, 135dd, 135gg, and 135jj. All of these agreements, including the Grayslake agreement, were approved at formal public meetings of the Lake County Board and the other governments involved. *Id.* All were subjected to extensive legal review before being executed.[2]

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[1] Judge Bua rejected petitioner's "veto" claim and found this provision was intended to, and did, foster intergovernmental cooperation. Pet. 74a-80a.

[2] Petitioner alludes to the fact that the agreement was reviewed by a lawyer who, years after it was executed, questioned its validity. Pet., p. 7. That lawyer

(Footnote continued on the following page)

B. Petitioner Failed To Obtain Any Decision From Anyone

Petitioner had one private meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service. There is not one iota of evidence to show that petitioner thereafter ever lifted a finger to obtain public sewer service. Neither before nor after that meeting did petitioner ever file a formal application or follow any formal procedures to obtain service.

Illinois law required that a formal Illinois Environmental Protection Agency ("IEPA") application had to be completed and approved by Lake County before petitioner could connect to the county interceptor. Tr. 144-46, 357-58; DX 228, ¶6.5. Under the Grayslake sewer agreement, PX 30, p. 8, Lake County was contractually bound to disapprove direct connections to the sewer serving Grayslake (the "Northeast Central system") if, but only if, the connection would impair the system's functional ability to serve Grayslake. Any direct connection that would impair that ability required Grayslake's written consent. *Id.*

Lake County's staff advised petitioner that he had to file the formal IEPA application. DX 54. If the IEPA application had been filed, Lake County would have been required to certify as to whether or not the Northeast Central system had adequate capacity to accomodate petitioner's proposed development. Tr. 144-46, 357-58; DX 228, ¶6.5. Nevertheless, the unrefuted evidence shows that petitioner made a conscious decision not to file that application because he did not want to spend the money it would cost to develop the necessary engineering data. Tr. 755, 757; DX 228, ¶5.1.[3]

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2 *(Continued)*
was a first-year associate attorney. However, the evidence at trial showed that the agreement had also been reviewed by several experienced municipal and bond attorneys before it was executed, with no question concerning its legality. DX 33, 38, 41, and 44; Tr. 152-53, 219, 222, 1323-25, 1338-40, 1352, 1451-54, and 1458-63.

[3] In lieu of the required application, petitioner provided only two sketchy maps, PX 48, showing proposed alternative sewer lines originating in empty country-

(Footnote continued on the following page)

Because petitioner refused to file the IEPA application, he never obtained *any* decision from Lake County concerning the adequacy of the system to accomodate his proposed development. Furthermore, because he never supplied any data that would allow Lake County to decide whether or not his development would impair the system's functional ability to serve Grayslake, the Lake County Board was never in a position to decide whether or not Grayslake's written consent to the connection was required.[4]

If the consent of Grayslake had been required, it is clear that only the Grayslake Board of Trustees, and not the Mayor of Grayslake, could give that consent. Under Illinois law, a village mayor does not have the right (except in special circumstances) even to vote on matters brought before the village board, much less the right to bind the village by comments made at a private meeting with a developer. Ill. Rev. Stat. ch. 24, §§3-11-14 and 3-12-2. Furthermore, under Illinois law, village boards cannot make any final decision about anything except at a properly noticed public meeting called for the purpose with a quorum in attendance. *See* Illinois Open Meetings Act, Ill. Rev. Stat. ch. 102, §§41-46.

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3 *(Continued)*
side. As petitioner's witness William Byers observed, looking at the only documentation petitioner ever prepared, "[t]his particular map here, I wouldn't even know what it is." Tr. 382. In submitting that documentation to Lake County's staff, petitioner's own engineer acknowledged that "detailed plans for submittal" had yet to be prepared. DX 180. In reacting to those plans, the Lake County staff referred to them as "conceptual" and advised petitioner of the need to submit "detailed engineering documents...as part of the Illinois EPA permit process." DX 54.

[4] Petitioner asserts that the Lake County Board refused to repudiate the Grayslake agreement. Pet., p. 7. In fact, not even that issue ever came before the full Lake County Board; it was discussed only by the Board's Public Service Committee. Petitioner, however, did not appear at that meeting, Tr. 1536-37, and never sought to take the issue to the full County Board, Tr. 852-53. In any event, a decision not to repudiate the agreement hardly qualifies as a decision to deny petitioner a sewer connection pursuant to the agreement. Neither the Lake County Board nor its Public Service Committee was ever presented a specific proposal or made any decision rejecting a connection for petitioner.

Petitioner, however, would encourage the violation of these "government in the sunshine" provisions by arguing that his private, evening meeting with one, non-voting member of the Grayslake Board is sufficient to constitute final action binding the Village. But, under Illinois law, nothing that was said at that private meeting could bind the Village to anything or deny petitioner of anything. Indeed, it would be most troublesome if the federal courts were to ignore the Illinois Open Meetings Act by holding that petitioner could rely on that meeting. Such a decision would only encourage developers and others to avoid debate in the public forum in favor of "one-on-one" private meetings with elected officials.

The plain fact is that petitioner should have sought formal approval of the Grayslake Board at a regular public meeting because, as the Seventh Circuit found:

> If [petitioner] had presented a formal application to the Grayslake Board of Trustees with adequate documentation about the density of the proposed development and the anticipated volume of sewage the connection would have to accommodate, then the Village could have made a reasonable decision about the Northeast Interceptor's ability to handle the excess.

Pet. 12a. The purpose of forcing formal compliance is clear and important. Until squarely faced with a decision that must be made *and with all the supporting evidence*, it is too easy for the responsible agency to avoid facing the issue. Like any free advice, a preliminary, informal reaction, based on incomplete data, is worth what you pay for it. If petitioner wanted a firm and final decision, he had an obligation to present his case. He refused to present his evidence to the local decisionmakers and, thus, it is not surprising that he did not get a decision.

Having refused to apply for a formal decision, petitioner now tries to excuse that refusal by claiming that, "...in Illinois there is no formal procedure for obtaining a connection to a public sewer." Pet., p. 19. That statement is blatantly inaccurate. The Seventh Circuit has so found. Pet. 11a-12a.

The Lake County IEPA application procedure has already

been discussed. There is no mystery about it. The forms are in the record. DX 228. Nor is there any mystery about how you get a decision from the Grayslake Board of Trustees.

Petitioner portrayed himself as a sophisticated developer who knew how to get things done. Tr. 651, 693. He certainly knew that if you want a village board to decide something, you ask to have it put on the agenda of a public meeting--or, if that's too hard, you stand up at one of the board's regular meetings and ask for a decision. That's how it works everywhere, and that's how it works in Grayslake. Tr. 1464-65. Petitioner, however, did nothing. Tr. 1480-81. Petitioner concedes that he never presented his sewer connection proposal to the Grayslake Village Board and never even sought to appear before the Board. Tr. 851.[5]

Petitioner is thus left to rely on that one brief, informal meeting he had with Grayslake's Mayor. But even if Illinois law allowed such reliance, it is plain that even what the Mayor said was not in any sense "final."

When petitioner met with Mayor Schroeder, Grayslake was evaluating a possible annexation of the "Heartland" project, a proposed 2,500 acre development. According to the Mayor's uncontroverted testimony, Grayslake wanted to evaluate the sewer capacity requirements involved before deciding whether there was sufficient capacity to accomodate petitioner's connection. Tr. 268-69. Under questioning by petitioner's counsel, Mayor Schroeder said:

> ...we had to find out what the use would be of the

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[5] The minutes of the February 21, 1981 Grayslake Village Board meeting, PX 145, illustrate how simple it was to bring a matter before the Board. Those minutes recorded under the heading "Audience," that "Barbara Bye presented a letter signed by the residents of the Garfield and Lincoln areas requesting the installation of a street light." The minutes also record that "Trustee Smith moved to approve the request of the American Unit of Home Bureau..."; "Trustee Christian moved to approve the request of the Jaycees..."; and that "Trustee Lucus moved to adopt the resolution proposed by the Lake County Regional Plan Commission...."

> potential annexations coming up, and then after we found that out, there would be some intelligent discussions as to what the future capacity would be.

Tr. 269. Petitioner himself testified that Mayor Schroeder said simply that "he didn't know *at what time* that answer would be available." Tr. 753. (emphasis added).

Subsequently, Mayor Schroeder sent a letter, also signed by the members of the Grayslake Village Board, to the Lake County Board. The letter asked that the County Board not repudiate its municipal sewer service agreements. However, the letter also reaffirmed Grayslake's willingness to consider petitioner's request for sewer connections:

> As a matter of record, *Grayslake has never taken the position that it will never consent to the connection by [petitioner's development.* Petitioner] was told that when those [Heartland] developers who are interested in annexing to Grayslake in the area immediately South and East to the Village annex of Grayslake then *consent would be given for the connection if sufficient capacity was available* in the County sewer to absorb development.

PX 111, p. 2 (emphasis added).

The uncontroverted evidence thus shows that the possibility of petitioner obtaining a sewer connection remained an open issue, intertwined with the question of how much future capacity would be available. Because petitioner never prepared and submitted a formal request or otherwise pressed the issue, no decision was ever made.

C. There Is a Reason Petitioner Did Not Seek a Decision

Petitioner is, by self-proclamation, a talented and successful developer who, he says, specializes in finding solutions where others cannot. Tr. 651-52. Why would such a person attend one brief private meeting with the Mayor of Grayslake and then immediately and totally give up his pursuit of regional sewer service? The answer is that he didn't want regional sewer service because it was going to cost him several million dollars to get it,

Tr. 750, and he already had Round Lake Park's agreement to let him use, Tr. 724, a much cheaper, DX 118, 195, 195a (though environmentally unsound, DX 108, p. 2), "package plant" to treat sewage from his development. What is more, he talked Round Lake Park into paying for the package plant, DX 190A, § 8, *and* prohibiting petitioner's competitors from using it, Tr. 762, 843-44. That was a pretty sweet deal.

His problem was that state environmental authorities had already told him that he could not use such a package plant *unless* he could demonstrate that the regional system could not serve his needs. DX 50. And, they told him, *the much greater expense of using the regional system was no excuse. Id.*

So what petitioner needed was an excuse acceptable to Illinois environmental authorities–such as a claim that he had sought and been denied the use of the regional system. Indeed, indisputable documents in the record establish that petitioner's pursuit of his package plant included lying to those state authorities in an effort to convince them that something more than money stood between him and regional sewer service.

Round Lake Park, like Grayslake, had a sewer service agreement with Lake County that gave Round Lake Park the absolute right to send sewage from anywhere in the Village to the regional system known as Northwest system. DX 135x.[6] Petitioner's property was in Round Lake Park. Petitioner was admittedly aware of the Round Lake Park sewer agreement. Tr. 826-27. Indeed, a letter to petitioner from the Mayor of Round Lake Park specifically advised petitioner that the agreement would allow him to pursue his package plant alternative if the County refused to serve him out of the *Northwest* (not Northeast Central) system. DX 185.

At trial, petitioner admitted that he never applied to use the Northwest system. Tr. 887. But despite having never applied

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[6] The agreement gave Round Lake Park no right to use the Northeast Central system that served Grayslake. Similarly, Grayslake had no right to use, or to prevent the use of, the Northwest system that served Round Lake Park.

to use that system, petitioner repeatedly lied to state agencies by claiming that he had been denied access to *both* the Northeast Central *and* the Northwest systems. DX 239, 239A, 189 at 1, 214, 216, and 215. In truth, however, the only thing that prevented petitioner's use of the Northwest system was his own desire for a less expensive alternative. *See* Tr. 750.[7]

Thus, it is Petitioner's desire for state approval of the cheap, exclusive package plant, Tr. 750; DX 118, 195a, that explains his half-hearted request to use the Northeast Central system and his total failure to pursue a connection to the Northwest system, the regional system that he had a clear right to use and as to which Grayslake had no rights whatever.

D. This Is Not a Case of Excluding Low Income Housing

There was no evidence at trial that any defendant acted out of any personal monetary interest or other venality, or on behalf of any private party or interest or out of any personal or political animosity toward petitioner. On the record, these were honest officials trying to deal with tough problems.

Petitioner has thus been forced to look elsewhere for some colorable claim of motivation for the alleged conspiracy against him. In an apparent effort to do that, petitioner opens his Statement of the case by characterizing himself as a "successful developer of low- and moderate-cost housing and light industrial projects...," Pet., p. 3, and fills his petition with innuendo to the effect that this case involves nothing more than an effort by

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[7] In this Court, petitioner attempts to pass off the Northwest system on the basis that "undisputed testimony had established [petitioner's use of it] would have violated state and federal area assignments...." Pet., p. 14 n. 9. But petitioner offers no citation to that "undisputed testimony." In fact, the only evidence about "area assignements" was presented by respondents and showed that petitioner could have applied for an area boundary change and gained access to the Northwest system. Tr. 1675, 1680; DX DD. Petitioner did not apply, and his *post-hoc* rationalizations for not applying do not explain why, if he had no right to use the Northwest system, he lied about having applied for and been denied such use.

some rich people to keep out some poor people. Not a shred of evidence was offered to support those unfortunate insinuations.

Petitioner's characterizations of his plan, himself and his business have not always been the same as they are here. The development plan that Round Lake Park approved for petitioner included a shopping center, a hotel, an office park, a light industrial park and single family and multiple family housing. DX 35. At the same time petitioner was prosecuting this case, he also was prosecuting another case against several other suburban governments that he alleged were conspiring to prevent him from building *luxury* housing. *LaSalle National Bank of Chicago v. County of DuPage*, 777 F. 2d 377, 382 (7th Cir. 1985). A newspaper interview given by petitioner just last month described:

> [Petitioner's] plans for at least three major downtown projects, the most visible of which will be the world's tallest apartment building, planned for . . . 600 N. Lake Shore Drive that will include a 75-story residential building, an adjacent five-star hotel and an international promenade of retail boutiques.

Crain's Chicago Business, August 29, 1988, pp. 3 and 53. The same article noted that: "In 1987, the company's revenues topped $100 million, with profits up 40% . . . ." *Id.* at 53.

Petitioner's side-by-side charactization, without any citation to the record, of Grayslake as a municipality "ranking among the most affluent in the Chicago metropolitan area," and of Round Lake Park as a "blue-collar community with high unemployment," Pet., p. 5, is equally misleading. The image petitioner seeks to create of great socio-economic differences between the two communities is contradicted by his own evidence. Plaintiff's Exhibit 63 contains 1970 census data for 17 communities within Lake County. Three communities had median incomes ranging from approximately $20,000 to $27,500. In contrast, Grayslake had a median income of only $13,089; Round Lake Park's median income was just slightly less, $11,381. Indeed, ten of the seventeen Lake County communities, including both Grayslake and Round Lake Park, had median incomes within the relatively narrow range of $11,000 to $13,400.

Judge Bua, after a "painstaking review of the record," found no proof of illicit motives of any kind:

> The plaintiffs utterly failed to meet the burden of showing that defendants reasons were . . . pretextual. . . .

Pet. 74a-75a. Rather, Judge Bua found only evidence of legitimate concerns about sewer capacity and rational planning of development in relation to available public services:

> [T]he evidence shows *overwhelmingly* that the sphere of influence is related to a legitimate government purpose or concern . . . the availability and cost of sewer services to Grayslake residents.
>
> * * *
>
> Indeed, there was *overwhelming* evidence presented at trial that Grayslake attempted to achieve such mutual and cooperative planning with Round Lake Park regarding the Heartland and Unity developments.
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> * * *
>
> [T]he Court holds that the evidence presented at trial shows *conclusively* that, not only was Grayslake's denial of sewer services reasonable under the sphere of influence agreement, but also the conditional grant of the Unity property's hook-up in exchange for mutual or cooperative planning of the Heartland development was reasonably related to controlling and mutually planning development lying between Grayslake and Round Lake Park.

Pet. 78a, 85a, 88a (emphasis added).

E. The Limited Capacity of the Northeast Central System and Round Lake Park's Lack of Rational Planning Were the Real Problems

As Judge Bua found, respondents' real concerns were, first, whether the limited sewage treatment capacity available was sufficient to serve petitioner and, second, how that limited capacity should be allocated in light of Round Lake Park's refusal to participate in any rational planning program.

The uncontroverted evidence shows that petitioner's proposed development was not part of capacity projections upon

which the Northeast Central system was designed and built. A letter from the Northeastern Illinois Planning Commission to the Illinois Environmental Protection Agency states:

> The population of the six hundred-acre [petitioner] development. . . *is not included* in the population projections of Northeast Central EPA Facilities Plan.

DX 96 (emphasis added). A report prepared for petitioner by a hired consultant specifically advised petitioner of this fact. DX 74, p. A004582.

It is also uncontroverted that the only sewage treatment plant serving the Northeast Central system simply did not have the capacity to handle the two large developments–petitioner and the Heartland–that were simultaneously seeking to connect to the system. When petitioner met with Grayslake's Mayor in October, 1978, the unused total capacity of the system was 4.18 million gallons per day. DX 116B. The total proposed average flow for petitioner and the Heartland was 4.72 million gallons per day, DX 116 and 116A, more than the *total* unused capacity of the plant. If petitioner and Heartland had obtained commitments for their sewer needs in 1978, there would have been no further capacity available for use in Grayslake or any of the several other communities that were originally intended to be served by that system. Any expansion of that system would have been costly and, even on optimistic assumptions, could not have occurred for almost 10 years. Tr. 372-74.

The foregoing data is the only data in the record regarding the system's capacity. The only evidence petitioner elicited was that no applicant for sewer service was rejected for lack of capacity. Tr. 369-70. That, of course, is precisely because petitioner and Heartland were not able to monopolize the limited capacity that remained in 1978.

These capacity limitations, along with similar problems affecting other public facilities, prompted Lake County and Grayslake to support the idea of a cooperative planning program to deal with these two massive developments. Grayslake voted to approve a planning program recommended by the Northeast Illi-

nois Planning Commission that would enable Grayslake, Round Lake Park and the County to work together toward a solution whereby petitioner and Heartland could be developed sensibly and also receive some sewer capacity. Tr. 1590-91; Pet. 85a-88a. The proposed compromise made perfect sense in light of the capacity concerns. Pet. 87a. Nevertheless, petitioner refused to support the proposal. Tr. 605-620; PX 126. Round Lake Park, after initialling indicating that it would agree to the proposal, repudiated it. Tr. 1466-68.

Petitioner completely mischaracterizes this proposed compromise and attempts to portray it as evidence of respondents' wrongdoing. Pet., p. 8. However, Judge Bua, an objective observer of all the evidence, found that the proposed compromise was "a desired and rational goal." Pet. 87a.[8]

II. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT AND ANY DECISION OF THIS COURT

A. The Seventh Circuit's Decision Is Fully Consistent With This Court's Ripeness Decisions

Several recent decisions of this Court have carefully defined the ripeness doctrine in the context of challenges to local land use and development activities. There is nothing difficult or mysterious about the rules established by those cases. The circuit courts have had no great difficulty in applying them. The conflicts alleged by petitioner are manufactured and imagined,

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[8] Petitioner also mischaracterizes challenges by Lake County and Grayslake to (1) his application for IEPA approval of his package plant, Pet., p. 8, and (2) his Round Lake Park zoning, Pet., p. 9. Lake County and Grayslake were only two of at least 18 objectors to petitioner's proposed package plant, including numerous municipalities and the North Shore Sanitary District. DX 97-107, 209-13, 218. Both the Northeastern Illinois Planning Commission ("NIPC") and the Illinois Department of Agriculture refused to recommend it, DX 108 and 110, and approval was denied, DX 113. Similarly, the litigation challenging petitioner's zoning was brought not only by Lake County and Grayslake, but also by a number of other municipalities. DX 114, 115. NIPC had recommended litigation if cooperative efforts to plan failed. Tr. 1591. That litigation is still pending.

not real.

Even if any further refinement of those rules were necessary or appropriate, this would hardly be the case in which to undertake that exercise.

At the outset, it is important to emphasize again that:

> [Petitioners] here assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake. Rather, they challenge the defendants' use of the powers granted them by the contract.

Pet. 14a. The decisions of this Court have uniformly refused to consider "as applied" challenges to regulations that have never been applied to the plaintiff. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019 (1984); *International Longshoremen's Union, Local 37 v. Boyd*, 347 U.S. 222, 224 (1954); *United Public Workers v. Mitchell*, 330 U.S. 75, 86-91 (1947); and *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472, 475-76 (1945). Thus, the Seventh Circuit's decision is based squarely on the most basic and well established requirement of the ripeness doctrine: Federal Courts do not entertain "as applied" challenges to regulations that have never been applied to the plaintiff.

This Court's most recent ripeness decisions involving challenges to local land use programs have, of course, required even more than an initial application of the regulation, but no reference to those cases is needed to resolve the instant dispute. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561 (1986). The "important questions" that petitioner suggests require the attention of this Court arise, if at all, only at the far periphery of ripeness analysis. They are certainly not presented by this case.

This is not a case in which the facts show that there was a final decision applying a local regulation to petitioner and in which the question is whether petitioner was obligated to go beyond that first denial to seek variances, or to submit alternate applications, or to pursue state remedies for compensation. This

case is much simpler than that.

The Seventh Circuit did not base its determination of prematurity on the petitioner's failure to pursue *all* avenues of relief. Quite to the contrary, the Seventh Circuit found that the petitioner had failed to present *any* formal application that would have provided a basis on which the Court could evaluate the impact and extent of the alleged denial of sewer service:

> Alter's efforts to obtain a sewer connection for the Unity property did not include a formal application to either Grayslake or Lake County, and thus did not result in a final decision. . . . Alter made no formal application to the Village Board of Trustees. Neither did he approach the Lake County Board to apply for a connection. Nor did he file a request with the IEPA to approve a connection to the Northeast Interceptor. . . . Alter . . . never applied for connection to the Northwest Interceptor. Alter failed to make any effort to obtain a final, reviewable decision before any governmental entity on his application for a sewer connection. . . . At this point, it is simply impossible for a court to determine how the Grayslake Board of Trustees or the Lake County Board would have acted on a formal application, or whether or to what extent the plaintiffs have been harmed.

Pet. 10a, 12a.

A brief summary of this Court's recent land use ripeness decisions will serve to place the Seventh Circuit's decision in proper context. In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court found that:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy *regarding the application* of the specific zoning provisions.

Id. at 260 (emphasis added).[9] So in this case, petitioner never submitted a formal request to any of the state or local agencies whose approval he required to connect to the public sewer sys-

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[9] The Court then turned to a consideration of the Agins' facial challenge to the ordinance, but petitioners here raise no such challenge.

tem. Pet. 10a. *Agins* thus disposes of this case.

Williamson, supra, carried the *Agins* ripeness analysis at least two steps forward. In *Williamson*, the Court noted that "[r]espondent has submitted a plan..., and thus has passed beyond the *Agins* threshold." 473 U.S. at 187. However, the Court noted that even the rejection of that initial plan did not constitute a "final decision" sufficient to permit review of an "as applied" taking claim because the property owner could have obtained, but did not apply for, variances. *Id.* at 188-90. *See also Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Furthermore, the Court held that the "as applied" taking claim was also not ripe because the property owner had not pursued state compensation remedies. *Id.* at 194.

In *MacDonald, supra*, the Court carried its ripeness analysis yet a step farther. In that case, the court found an "as applied" taking challenge was not yet ripe despite the fact that the property owner had submitted one subdivision proposal and had received a final decision concerning it. The Court concluded that this was not sufficient because the rejection of that proposal did not suggest that *no* proposal would be approved:

> Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.

Id. at 2569 n. 9. *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136-137 (1978).

The "important issue" that petitioner says *Williamson* left undecided is whether the additional requirements that *Williamson* and *MacDonald* impose beyond the "*Agins*' threshold" do or do not apply to due process and equal protection claims as well as to taking claims. *But see Williamson, supra*, 473 U.S. at 197-200. That question, however, is simply not raised in this case.

For purposes of this case *Agins*, *Williamson* and *MacDonald* all stand for the same simple, universal proposition of ripeness law: Before an "as applied" challenge to a regulation may be brought, the plaintiff must have made at least one "meaningful

application" and must have pursued it at least to the point of a "final decision" by the "initial decisionmaker." In this case, petitioner made no application, much less a "meaningful one" and, therefore, the governing bodies of the respondent local governments, which alone had authority to act as the "initial decisionmaker," were never called upon to make any decision, much less a "final decision." *Compare Abbott Laboratories v. Gardner*, 387 U.S. 136, 151 (1967) (a regulation *was* ripe for review where "[t]here is no hint that this regulation is informal...or only the ruling of a subordinate official...or tentative").

The Seventh Circuit simply had no need to, and did not, rely upon the variance, reapplication, and local remedy requirements of *Williamson* and *MacDonald* in deciding that petitioner's "as applied" challenge was premature. The Seventh Circuit required simply that "[a] final decision must be demonstrated by a development plan submitted, considered, and rejected by the governmental entity." Pet. 9a. Petitioner could not pass even that minimal threshold.

And, at that threshold level, it is quite clear that the ripeness requirement applies equally and without distinction to all "as applied" constitutional challenges to regulatory schemes, whether those challenges arise under the takings clause, the due process clause or the equal protection clause. *See Pennell v. City of San Jose*, 108 S. Ct. 849 (1988). *See also Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). In *Pennell*, plaintiffs challenged a rent control ordinance both facially and "as applied" under both the takings clause and the due process clause. This Court held that the facial challenges were ripe for decision but that the "as applied" challenges, whether under the takings clause or the due process clause, were not ripe because the ordinance had never been applied to the plaintiffs.

The Court first considered the takings claim and found that "it would be premature to consider this contention on the present record" because the ordinance had not been applied to the plaintiffs. 108 S.Ct. at 856-57. The Court then turned to similar "as

applied" claims brought under the due process and equal protection clauses and concluded that they, like the taking claim, were not ripe because the ordinance had not been applied to plaintiffs:

> For this reason we also decline to address appellant's contention that application of [the ordinance] violates the Fourteenth Amendment's due process and equal protection requirements.

Id. at 857 n. 5 and 858 n. 7. Despite this finding that both the takings and the due process "as applied" claims were premature, the Court went on to consider the merits of the facial challenge to the ordinance based both on the takings clause and the due process clause. *Id.* at 857-59.

The *Pennell* analysis is completely consistent with this Court's previous treatment of the ripeness issue. The critical distinction–at least at the threshold level of ripeness analysis–is not between claims based on the takings clause and claims based on the due process clause. Rather, the critical distinction is between "as applied" challenges and facial challenges. *See, e.g., Agins, supra*, 447 U.S. at 260 (in the absence of a final decision on an application for development approval, an "as applied" taking claim is not ripe; however, a facial taking claim is ripe); *Pacific Gas, supra*, 461 U.S. at 201 and 203 (statutory provision requiring case-by-case analysis of nuclear storage capacity was not ripe, "because 'we cannot know whether the Energy Commission will ever find a nuclear plant's storage capacity to be inadequate'"; however a challenge to a general moratorium provision was ripe because as to it "[t]he question of pre-emption is predominantly legal. . . ."); and *Hodel, supra*, 452 U.S. at 295-96 and 304 (because the regulation had never been applied to plaintiffs, an "as applied" taking claim was not ripe, but plaintiffs' facial taking claim could be adjudicated; because civil penalty provisions had never been applied to plaintiffs, plaintiffs' "as applied" due process challenge was not ripe).[10]

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[10]Although petitioner raised no facial challenge to the Grayslake agreement,

(Footnote continued on the following page)

B. There Is No Inconsistency Between the Seventh Circuit's Decision and This Court's Post-*Williamson* Decisions

Petitioner's claims that the Seventh Circuit's decision is inconsistent with this Court's decisions in *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 107 S. Ct. 2378 (1987); and *Pennell v. City of San Jose*, *supra*, are completely unfounded.

Nollan involved no ripeness issue whatever. The passage quoted by petitioner, Pet., p. 24, dealt with the standard of rationality, not the standard of ripeness, to be applied in takings and due process cases. *Nollan*, *supra*, 107 S. Ct. at 3147 n.3.

First English involved neither a ripeness issue, a taking issue nor a due process issue; it involved only a remedy issue. The Court found that the unusual procedural posture of the case squarely presented the remedy issue without the need for the Court to determine whether a taking had actually occurred and was ripe for review. *First English*, *supra*, 107 S. Ct. at 2383-84.

As already discussed, the Seventh Circuit's decision is fully consistent with *Pennell*. Petitioner is simply incorrect in claiming that *Pennell* distinguished between takings claims and due process claims, Pet., p. 25; *Pennell* distinguished between facial and "as applied" claims and, within those categories, applied the ripeness doctrine in exactly the same way whether the claim arose under the takings clause or the due process clause. *Pennell*, *supra*, 108 S. Ct. at 856-57, 857 n. 5 and 858 n. 7.

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10 *(Continued)*
the District Court, in effect, decided and rejected such a challenge on the way to deciding the "as applied" challenge. The first step in Judge Bua's "as applied" analysis was to analyze the constitutional reasonableness of the agreement. Pet. 74a-80a. The court concluded: "[T]he evidence shows overwhelmingly that the sphere of influence is related to a legitimate government purpose or concern." *Id.* at 78a.

C. This Case Presents No Exhaustion Issue

Petitioner's suggestion that the Seventh Circuit's decision conflicts with this Court's repeated holding that exhaustion of state remedies is not a prerequisite to actions under §1983 is plainly frivolous. As this Court so succinctly said in *Williamson*:

> [T]he finality requirement is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial...review.... *Patsy* concerned the latter, not the former.

Williamson, supra, 473 U.S. at 193 (construing *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982)).

In this case, petitioner never gave the "initial decisionmaker" an opportunity to make a decision. This case, therefore, presents no question concerning his obligation to exhaust state procedures for the review of such an initial decision.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE SEVENTH CIRCUIT'S APPLICATION OF THE RIPENESS DOCTRINE TO BAR PETITIONER'S "AS APPLIED" CHALLENGE

A. Petitioner Has Failed To Cite Decisions of the First, Tenth and Eleventh Circuit Courts. Both Those Decisions and the District Court Opinions From Those Circuits That Petitioner Does Cite Are Consistent With The Seventh Circuit's Decision

For the proposition that the First, Tenth and Eleventh Circuits are in conflict with the Seventh Circuit's decision in this case, petitioner cites only district court opinions from those circuits. *See Lerman v. City of Portland*, 675 F. Supp. 11 (D. Me. 1987); *Oberndorf v. City and County of Denver*, 653 F. Supp. 304 (D. Colo. 1986); *Upah v. Thornton Development Auth.*, 632 F. Supp. 1279 (D. Colo. 1986); and *Carroll v. City of Prattville*, 653 F. Supp. 933 (M.D. Ala. 1987). In each case, however, petitioner has failed to advise this Court of Courts of Appeals decisions in

those Circuits that are entirely consistent with the Seventh Circuit's decision in this case. *See Culebras Enterprises Corp. v. Rivera Rios*, 813 F. 2d 506 (1st Cir. 1987); *ACORN v. City of Tulsa*, 835 F. 2d 735 (10th Cir. 1987); and *Corn v. City of Lauderdale Lakes*, 816 F. 2d 1514 (11th Cir. 1987).[11]

1. There Is No Conflict With the First Circuit

In *Culebras*, *supra*, the First Circuit specifically held that the *Williamson* ripeness doctrine applied to defeat plaintiff's due process claim for damages resulting from the adoption of a zoning ordinance that allegedly prevented the development of plaintiff's property. 813 F. 2d at 515-16. This result was reached despite the fact that, in *Culebras*, the local government had officially acted not only to adopt the challenged zoning ordinance but also to deny the plaintiff's subsequent request for administrative relief from that zoning ordinance. *Id.* at 509. In contrast, in this case, the respondent local governments have never taken any official action whatever with regard to petitioner.

There is obviously no conflict between *Culebras* and the Seventh Circuit's decision in this case. Furthermore, however, it is also clear that the *Culebras* court was dealing at at least the second or third level of ripeness analysis under *Williamson* and *MacDonald* while the Seventh Circuit had no occasion to go beyond

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[11]It should also be noted that there is no inconsistency between the Seventh Circuit's decision in this case and any of the District Court cases cited by petitioner. In each of those cases, the "initial decisionmaker" had arrived at a "final decision" that carried the plaintiff past the threshold of ripeness. In *Lerman*, *supra*, the challenged official action was the already completed demolition of a building without affording its owner procedural due process prior to the demolition. In *Oberndorf*, *supra*, the challenged activity was the city council's formal adoption of an urban renewal plan designating the plaintiff's property as blighted. In *Upah*, *supra*, five separate official actions, all formally approved by the local governing body, were alleged to violate the plaintiff's constitutional rights. In *Carroll*, *supra*, the court expressly noted that the defendants did not challenge "plaintiff's allegation that the defendants' actions are administratively final...." 653 F. Supp. at 942 n. 12. The court dismissed the taking claim solely because plaintiff had failed to exhaust an adequate state compensation remedy under the second prong of the *Williamson* test. *Id.* at 942.

the threshold question of "whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson*, *supra*, 473 U.S. at 193.

2. There Is No Conflict With the Tenth Circuit

In *ACORN*, *supra*, as in this case, the plaintiff ACORN had been given indications by subordinate public bodies and their staffs that its request to use a public park would not be approved. However, under applicable local law, only the City Board of Commissioners had authority to officially make that decision. ACORN, however, never asked the Board of Commissioners to authorize its activity. 835 F.2d at 737-38.

Under these facts, the Tenth Circuit declined to consider ACORN's "as applied" challenges to the ordinance in question because the ordinance "...has not been applied to *ACORN*." *Id.* at 743. The Tenth Circuit did, however, note that ACORN's facial challenge was ripe because "a first amendment challenge to the facial validity of a statute is a strictly legal question; it does not involve the application of the statute in a specific factual setting." *Id.* at 740. In so holding, the court carefully distinguished between the application of the ripeness doctrine to facial challenges and its application to "as applied" challenges:

> We emphasize, however, that our holding that ACORN has standing to challenge these ordinances and that this case is ripe for decision does not expand the substantive issues that we should address beyond those appropriate to a challenge to the facial validity of the ordinances.

Id. In the present case, of course, petitioners "assure us that they do not challenge the facial validity of the agreement between Lake County and Grayslake." Pet. 14a. The Seventh Circuit properly concluded that petitioner's "as applied" challenge is not ripe for the same reason that the Tenth Circuit concluded that ACORN's "as applied" challenge was not ripe: There has been no decision by the only body authorized to make the decision.

3. There Is No Conflict With the Eleventh Circuit

In *Corn*, *supra*, the Eleventh Circuit expressly interpreted the second prong of *Williamson* (failure to pursue a state compensation remedy) as making no distinction, for ripeness purposes, between due process claims and taking claims. 816 F. 2d at 1516 n. 2. Here, once again, the Eleventh Circuit's ripeness analysis proceeds at a level that the Seventh Circuit was never required to reach, but certainly that analysis is in no way inconsistent with the Seventh Circuit's decision.

B. The Second, Third, Fourth, Fifth and Eighth Circuit Decisions Cited by Petitioner Do Not Address the Ripeness Issue Decided by the Seventh Circuit

In support of its position that the Second, Third, Fourth, Fifth and Eighth Circuits disagree with the Seventh Circuit's interpretation of *Williamson*, petitioner cites seven opinions, most of which do not even mention *Williamson* or ripeness. *See Sullivan v. Town of Salem*, 805 F. 2d 81 (2d Cir. 1986); *Neiderhiser v. Borough of Berwick*, 840 F. 2d 213 (3d Cir. 1988), and *Bello v. Walker*, 840 F. 2d 1124 (3d Cir. 1988); *Scott v. Greenville County*, 716 F. 2d 1409 (4th Cir. 1983); *Suthoff v. Yazoo County Industrial Development Corp.*, 637 F. 2d 337 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); and *Mitchell v. Mills County*, 847 F. 2d 486 (8th Cir. 1988), and *Littlefield v. City of Afton*, 785 F. 2d 596 (8th Cir. 1986).

1. There Is No Conflict With the Second Circuit

Petitioner's treatment of *Sullivan*, *supra*, is, to put it charitably, deceptively confused. In a single paragraph, petitioner weaves together random quotes from different sections of the opinion to give the appearance that the Second Circuit said just the opposite of what it actually said. *Sullivan* does not even mention ripeness. However, what it does say supports respondents. In *Sullivan*, various subordinate town officials told Sullivan that his subdivision roads would be accepted if improved in a certain

way. 805 F.2d at 83. However, after Sullivan so improved the roads, the official town body responsible for accepting the roads, declined to do so. Sullivan brought suit.

The Second Circuit held that Sullivan had not stated a cause of action under the due process clause, noting specifically that:

> This is particularly true because it was within Sullivan's power under Connecticut law to convene a town meeting to consider the question of acceptance, without the direct participation of the planning and zoning commission or the board of selectman. All that was needed was the application of 20 qualified voters.

Id. at 84. It would have been far easier than that for petitioner to get a formal decision. He could have simply gone to a County or Village Board meeting and made his request and presented his case. He simply did not do so.

2. There is No Conflict With the Third Circuit

In both *Neiderhiser*, *supra*, and *Bello*, *supra*, the defendant governments had acted finally to deny the requested permits. In each case, those denials were sufficiently final to have been appealed through, and reversed by, the State court system. Both cases arose on pre-trial motions, and the question was not whether there had been a denial, but simply whether the plaintiffs had sufficiently plead that the denial was constitutionally improper. Thus, neither of these Third Circuit decisions contributes anything to an understanding of the Seventh Circuit's opinion, which is based squarely on the fact that there never was even an initial denial of petitioner's request for sewer because petitioner "... failed even to present a formal application to either the Village of Grayslake or Lake County." Pet. 12a.

Suburban Trails, Inc. v. New Jersey Transit Corp., 800 F. 2nd 361 (3d Cir. 1986), is a Third Circuit decision more in point. In that case, based on facts closely analogous to this case, the Third Circuit concluded that neither constitutional nor antitrust claims were ripe for review. There, as here, plaintiff had made preliminary inquiries concerning its eligibility for a grant and had been given preliminary indications that the grant would be

denied. Plaintiff then brought suit. The Third Circuit found the controversy not ripe, stating:

> Although staff members had expressed their disapproval, a formal denial must come from the Board itself. . . . We are thus presented with a situation in which the allocation of buses–the plaintiffs' principal concern–is subject to a decision by N.J. Transit which has not yet been formally made. . . . Until an agency has completed its work by arriving at a definitive decision, judicial review is premature.

Id. at 365. The Seventh Circuit said neither more nor less.

3. There Is No Conflict With the Fourth and Fifth Circuits

Scott, *supra*, and *Suthoff*, *supra*, were decided before *Williamson*. They obviously say nothing about the Fourth and Fifth Circuits' interpretation of *Williamson*. Neither so much as mentions the ripeness doctrine.

The Fourth Circuit did address *Williamson* in *Plakas v. County of Middlesex*, noted 803 F. 2d 714 (4th Cir. 1986) (op. not for pub.; text in Westlaw). In that case, the Fourth Circuit applied the second prong of *Williamson* (failure to pursue a state compensation remedy) to bar as unripe *both* a takings claim and a due process claim. The Seventh Circuit, of course, had no need to reach the second prong of *Williamson*, and there is clearly nothing in its decision of this case that is in conflict with *Plakas*.

4. There Is No Conflict With the Eighth Circuit

In *Mitchell*, *supra*, and *Littlefield*, *supra*, the challenged activity or ordinance had been formally, finally and definitely applied to the plaintiff and there was, therefore, no issue concerning threshold ripeness.

Neither *Williamson* nor ripeness was even mentioned in *Mitchell's* discussion of due process. Plaintiff alleged that its property had been damaged by the building of a county road, obviously a completed action.

The *Littlefield* due process claim was ripe because (1) the

Littlefields had, unlike petitioner here, filed a proper application for a building permit and had "complied with all the *legal* requirements contained in the ordinances of the City of Afton" for issuance of such a permit, 785 F.2d at 602 (original emphasis) and (2) the city council, unlike the respondent governments here, had formally acted on that permit request and had refused to issue the permit unless the Littlefields " 'conveyed... additional public right of way' " to two neighboring property owners. *Id.* at 598-99. Thus, unlike the situation here, the plaintiff had formally and properly applied for a permit, and the initial decisionmaker had arrived at a formal and final position to deny that permit. The presence of those circumstances in that case led the Eighth Circuit to conclude that plaintiff's claim was ripe; the absence of those circumstances in this case led the Seventh Circuit to the opposite conclusion. In this, there is no conflict.[12]

C. There Is No Conflict With the Ninth Circuit

Finally, while conceding that the Ninth Circuit has reached results similar to the Seventh Circuit's decision in this case, *see Kinzli v. City of Santa Cruz*, 818 F. 2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988), and *Herrington v. County of Sonoma*, 834 F. 2d 1488 (9th Cir. 1987), petitioner argues that *Herrington* cannot be reconciled with the Seventh Circuit's decision. Petitioner makes this argument by stringing together unrelated snippets from *Herrington*. Pet., p. 21.

It is especially interesting to note that, in arguing that there is a conflict between this case and *Herrington*, petitioner cites only passages from part A.2 of *Herrington* ("*Ripeness--MacDonald's Reapplication Requirement*"). The Seventh Circuit on the other hand very carefully cited only part A.1 of *Herrington* ("*Ripeness--Kinzli's Final Decision Requirement*"). *See Her-*

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[12]It should be noted that the Eighth Circuit has apparently retreated from its holding in *Littlefield* that the denial of a zoning permit in violation of state law states a federal substantive due process cause of action. *Lemke v. Cass County*, 846 F. 2d 469 (8th Cir. 1987).

rington, supra, 834 F.2d at 1494 and 1497. Thus, despite petitioner's creative cutting and pasting, it is clear that *Herrington* is fully consistent with the Seventh Circuit's opinion concerning the crucial issue in this case–whether petitioner has satisfied the threshold requirement enunciated in *Agins, Williamson* and *MacDonald* by demonstrating that "the initial decisionmaker has arrived at a definitive position":

> "The preliminary question for us is whether the *Kinzli* final decision requirement, derived from the Supreme Court's taking cases, applies to the due process and equal protection claims asserted by the Herringtons. We conclude that the requirement applies. . . ."

Id. at 1494. *See also Kinzli, supra* (abandonment of application prior to a final decision rendered unripe taking, due process and equal protection claims).

Herrington's subsequent discussion of the differences between taking claims and due process claims for purposes of applying the *MacDonald* reapplication requirement is relevant only after the "final decision" threshold has been crossed. In this case, petitioner never crossed that first threshold. There was, therefore, no need for the Seventh Circuit to discuss subtle differences that might be relevant if he had. *Herrington* may raise the question petitioner asks this Court to address. This case clearly does not.

IV. THE SEVENTH CIRCUIT CORRECTLY AFFIRMED THE DISTRICT COURT'S JUDGMENT N.O.V. ON PETITIONER'S ANTITRUST CLAIM

A. The Antitrust Claim Was Not Ripe

Although petitioner repeatedly cites *Patrick v. Burget,* 108 S. Ct. 1658 (1988) as though it were a landmark decision on ripeness, Pet., pp. i, 15, 26-27, ripeness was never raised nor even mentioned. Petitioner, however, concludes that because the facts mentioned in *Patrick* reflect that the petitioner there brought suit before the completion of the peer-review proceedings he was challenging, one can imply that a final decision was

unnecessary for ripeness. However, in *Patrick*, plaintiff claimed that the mere existence of the peer review process violated the Sherman Act; he contended that respondents "*initiated* and participated in the hospital peer-review proceedings to reduce competition." *Id.* at 1661 (emphasis added). Petitioner here makes no such claim; his claim is based on the denial of service. Pet. 14a. The Seventh Circuit, therefore, correctly held that because petitioner was not claiming that the mere existence of the Grayslake sewer agreement operated as a restraint of trade, his challenge based on the wrongful application of that agreement was necessarily unripe in the absence of any evidence that it had ever been applied to him. *See Suburban Trails, Inc. v. New Jersey Transit Corp.*, 800 F. 2d 361, 368 (3d Cir. 1986).

B. Petitioner's Claim Is Barred by the State Action Doctrine

The Seventh Circuit's holding that "the defendants are immune from antitrust liability under the state action doctrine," supported by two pages of analysis in the court's opinion, is clearly correct. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, (1985). It is also clearly an alternative ground of decision and not, as petitioner suggests, merely "dicta." Pet., p.14 n.10. As this Court has consistently held, "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum*." *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) (citations omitted).

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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No. 88-282

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM ALTER, UNITY VENTURES, and LASALLE NATIONAL BANK,
Petitioners,

v.

EDWIN M. SCHROEDER, NORMAN C. GEARY, GEORGE BELL, VILLAGE OF GRAYSLAKE, and COUNTY OF LAKE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF AUTHORITIES

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REPLY IN SUPPORT OF PETITION FOR CERTIORARI

1. Respondents' lengthy recital of their jury arguments is unnecessary, because the only relevant facts are those few and simple ones relied on by the Court of Appeals for its legal ruling. Holding a matter of law that petitioner had not satisfied the ripeness requirements of *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985), the Court of Appeals nevertheless acknowledged:

—Petitioner "submitted to the Lake County Public Works Department two plans for the connection," A. 5a, which were "approved," *id.*, until the Grayslake Trustees issued their "rebuff." A. 6a; see also A. 43a.

—In the Court of Appeals' words, "When Alter met with Mayor Schroeder and others October 31, 1978, Schroeder, *speaking with the knowledge and approval of the Board of Trustees, told him that Grayslake would not consent at that time* to the Unity property connecting to the Northeast Interceptor." A. 10a (emphasis supplied). It was undisputed that the mayor at the same time announced "there is no use talking about density or anything else," and that "he didn't know at what time" Grayslake would "even consider" petitioner's proposal. T. 753.[1]

—After Grayslake's refusal, his village for petitioner "appealed Grayslake's veto of Alter's requested sewage connection to the Lake County Board," which took no action in spite of its counsel's opinion supporting petitioner. A. 5a-6a.

—Later, after petitioner failed to assist them in blocking another developer, "the Grayslake trustees on February 2, 1981, unanimously rescinded their earlier resolution to consider allowing the Unity Property to connect to the Northeast Interceptor," A. 7a,[2] and further filed objections to block petitioner from building a separate treatment plant. A 6a-7a.

Only then did petitioner finally sue.

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[1] The District Court found that petitioner suffered "the denial of a sewer hook-up," A. 93a, because "[i]n the present case, there was a refusal by Grayslake," A. 84a, that "any more formal application would have been futile," A. 25a, 40a, and that under Illinois procedure "there is no requirement of a particular formalized application process." A. 25a. Respondents argue in this Court that petitioner should have gone to the Illinois Environmental Protection Agency, Br. Op. 4; in the District Court they conceded that such an application would not have been considered unless the county joined it. A. 26a.

[2] It was undisputed that adequate capacity to accommodate petitioner was available at all times, T. 365, and that Grayslake consented to connections by other developers who had agreed to annexation by Grayslake, T. 304-08.

The Court of Appeals nevertheless held as a matter of law, based on its reading of *Williamson County*, that petitioner should have gone back and after three years "should have sought formal approval of his request for a sewer connection from the Grayslake Board of Trustees at a regular meeting," A. 12a, and that "thus," A. 10a, his claims that he had been denied equal protection, procedural due process and substantive due process should not have been heard.

The simple question is whether the Court of Appeals' legal ruling was right. First, does *Williamson County* apply to a non-taking § 1983 case at all? Second, after a § 1983 plaintiff has been authoritatively informed that he is turned down, appeals unsuccessfully, is blocked by other improper actions while other applicants are approved, and later is again informed by a formal resolution that he will not be considered, has he not finally done enough to file a § 1983 civil rights claim in federal court?

2. Respondents say nothing at all about—in fact, they do not even cite—*Felder* v. *Casey*, 108 S. Ct. 2302 (1988), discussed at length at Pet. Cert. 15, 22, 23. *Felder* held that § 1983 does not "force[] injured persons to seek satisfaction from those alleged to have caused the injury in the first place," or "to seek redress from the very state officials whose hostility to those rights precipitated those injuries." 108 S. Ct. at 2311, 2312.

3. Respondents say nothing at all about petitioner's § 1983 claim that he was denied *procedural* due process. The Seventh Circuit, lacking the benefit of this Court's subsequent decision in *Felder* v. *Casey*, *supra*, simply held that the "procedural due process claim is not ripe" and erroneously interpreted § 1983 and *Williamson County* as remitting petitioner to the tender mercies of the very officials whose persistent devices he was complaining of. A. 13a. The Ninth Circuit, by contrast, has said it doubts that *Williamson County* applies to pro-

cedural due process claims at all. *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1495 (9th Cir. 1987).

4. The Court of Appeals itself here recognized that whether *Williamson County* applies here is an open question, not yet ruled upon by this Court. A. 8a-9a. It resolved that question by holding that although "[t]he Supreme Court's recent discussion of ripeness has been in the context of regulatory taking claims," nevertheless "the ripeness analysis used in those cases applies as well to equal protection and due process claims." *Id.*

Several Circuits now have looked at that same question, and come to differing conclusions. The Eighth Circuit in at least two cases has held "taking" claims "not yet ripe" under *Williamson County* while at the same time holding that parallel § 1983 due process claims were ripe. *Mitchell* v. *Mills County*, 847 F.2d 486, 488 (8th Cir. 1988); *Littlefield* v. *City of Afton*, 785 F.2d 596 (8th Cir. 1986). The Ninth Circuit likewise, again contrary to the Seventh here, holds that "*Williamson* does not require us to apply the identical ripeness standard for takings to . . . substantive due process, procedural due process and equal protection claims," and that such differing claims "are not fungible." *Herrington* v. *City of Sonoma*, 834 F.2d 1488, 1499, 1498 n.7 (9th Cir. 1987). On the other hand, as respondents correctly point out, the Eleventh Circuit, like the Seventh here, has concluded that in *Williamson County* "the Supreme Court implicitly ruled that the same ripeness test must be applied to both [due process and taking] claims." *Corn* v. *City of Lauderdale Lakes*, 816 F.2d 1514, 1516 n.2 (11th Cir. 1987).

5. Because this was a § 1983 action complaining of a whole course of conduct to deny Fourteenth Amendment rights, extending over several years, respondents' discussion of cases about statutes challenged "on their face" or "as applied" is quite irrelevant. Petitioner here was not

challenging the facial validity of a statute or regulation; the District Court found that "the acts complained of have already occurred." A. 26a, 84a, 93a. Nor is this a case where, as respondents incorrectly say, "Petitioner had one meeting with the Mayor of Grayslake and, on that basis, alleges the denial of sewer service." Br. Op. 4. As the complaint alleged and as the jury found, at issue were what the District Court called a whole "series of wrongful acts" by respondents, A. 43a, cumulating over a period of three years, designed unlawfully to block him at every turn, even from building his own treatment plant. See Pet. Cert. 10-11. To hold that such a series of concerted, completed acts could not state a ripe tort claim under § 1983 is to take away much of the force of that statute. The Seventh Circuit here is in clear conflict with, for example, *Bello* v. *Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1968, in which the Third Circuit held that a § 1983 claim was ripe when it alleged "that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process." See Pet. Cert. 17.

6. Respondents misstate the holdings of recent cases in other Circuits. For just two examples:

—In *Sullivan* v. *Town of Salem*, 805 F.2d 81 (2d Cir. 1986), the Second Circuit saw no ripeness obstacle to a § 1983 due process claim of improper denial of an occupancy certificate, even though there was less official action than here—in that case, merely a negative statement by the first selectman and a building official—and the plaintiff chose to forgo a specifically prescribed legal recourse to a town meeting. See Pet. Cert. 20. Respondents' irrelevant quotation from a different section of that opinion, Br. Op. 25, was followed by the court's observation that "Sullivan's certificate of occupancy claim, however, rests on a different footing . . . ." 805 F.2d at 84.

—In *Neiderhiser* v. *Borough of Berwick*, 840 F.2d 213 (3d Cir. 1988), *pet'n for cert. pending*, No. 87-1969,

which respondents are unable to distinguish in any coherent way at all, see Br. Op. 25, the Third Circuit held a § 1983 due process claim ripe even though an initial denial of a zoning exemption was later reconsidered and actually *granted*. There is no way that that § 1983 claim can be heard and this one not.

7. Respondents also are unable to justify or explain the Seventh Circuit's novel ruling that Sherman Act claims can be unripe even after acts in restraint of trade have been committed. When they say that "ripeness was never raised nor even mentioned" in *Patrick* v. *Burget*, 108 S. Ct. 1658 (1988), see Br. Op. 28, they are correct, but they really underscore the point. If *Williamson County*'s ripeness test for taking cases applied to the Sherman Act, then *Patrick* v. *Burget* could not have been decided as it was. See Pet. Cert. 26-27. Ripeness was not considered to be an obstacle in *Patrick*, even though the plaintiff there had not sought relief through the peer-review process at all.[3]

* * * *

Petitioner believes that this Court when it sensibly decided *Williamson County*—in the peculiar context of zoning procedures and "taking" claims—did not mean to block ordinary § 1983 suits alleging a course of tortious actions by state officials to deny procedural due process, substantive due process, and equal protection of the laws. The full meaning and implications of *Williamson County* have been called "a puzzle," creating "difficulty" for the lower courts.[4] *Williamson County*'s meaning outside the

[3] Respondents also do not discuss or deny the conflict on this point with Eighth and Ninth Circuit cases cited at Pet. Cert. 27. Their argument, Br. Op. 29, that state-action immunity should apply, goes to merits; although petitioner could demonstrate at length that the Court of Appeals erred in its dictum on that point, that issue is not before this Court because the holding below relied on ripeness.

[4] *HMK Corp.* v. *County of Chesterfield*, 616 F. Supp. 667, 671 (E.D. Va. 1985); *Kaiser Dev. Co.* v. *City and County of Honolulu*, 649 F. Supp. 926, 941 n.18 (D. Haw. 1986).

"taking" context, if it has one, is a recurring question that will have to be addressed, and better sooner than later. The present record demonstrates probably the most extreme interpretation of that decision to date. The Seventh Circuit put the inevitable issue plainly and simply.

CONCLUSION

For the reasons stated here and in the petition, certiorari should be granted and the judgment vacated or the case set for argument.

Respectfully submitted,

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